Supreme Court, U.S.
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In The

Supreme Court of the United States

CLEM ABRAMS and JOHN BOHANNON,

Petitioners,

v.

CITY OF SAN DIEGO,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeal For The State Of California, Fourth Appellate District

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May an intermediate California appellate court be permitted to tamper with the core language of the "rough proportionality" test of *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (acquiesced in by the California Supreme Court in *Ehrlich v. City of Culver City*, 12 Cal.4th 854, 860 (1996)), the terms of which have become uniform and well-settled throughout Takings Clause Jurisprudence, so as to pervert the true and intended meaning of this important test and allow local government and its developer cohort to engage in chicanery to deny owner just compensation for the taking of his land, thereby forcing this owner alone to bear public burdens which in all fairness and justice should be borne by the public as a whole? *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

2. May the California state courts be allowed to avoid (indeed, stand on its head) the true and intended meaning of the "rough proportionality" test of *Dolan v. City of Tigard* by the disingenuous artifice of eliminating therefrom the words "impact of the project" and substituting the word "benefits" in their place whenever they purport to apply and conform to *Dolan's* "rough proportionality" standard, so that, to owner's loss, the new, made up, California rendition of the *Dolan* test reads: "the *Dolan/Nollan* test requires that the assessment be roughly proportional to the *benefit* received by the property"? [App. 12]

3. May a local government successfully circumvent the rough proportionality requirements of *Dolan v. City of Tigard* and take private property without paying just compensation, simply by contriving a so-called Cost Reimbursement District, relying on obsolete (pre-*Dolan*) state law, to accomplish indirectly what it could not justify directly, that is to take owner's property without

QUESTION PRESENTED

paying just compensation, a process which one highly regarded California jurist described as "a cynical method of automatically shifting the cost of an improvement benefitting the public onto the backs of a few landowners because of the fortuity of their location," where the local government agency first "puts funds therefor in a landowner's pocket – and then proceeds to pick the pocket"? The City and its cohort did exactly that in this case.

4. Was the California courts' mendacious substitution of the word "benefits" in place of "the impact of the project" in purporting to apply the rough proportionality test of *Dolan v. City of Tigard*, an intolerable violation of settled federal constitutional law, requiring reversal of the judgment of the California courts and issuance of an order requiring entry of judgment in favor of Property Owners, so their 13-year quest for constitutional justice may finally be concluded?

PARTIES TO THE PROCEEDINGS BELOW

Petitioners and Petitioners below are Clem Abrams and John Bohannon ("Property Owners") as individuals. Respondent and Respondent below is the City of San Diego ("City"), a California Municipal Corporation. Mesa Shopping Center East, whose interests may be affected by the outcome of this case, is appearing as a Real Party in Interest.

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OPINIONS AND ORDERS BELOW

The unpublished memorandum opinion of the California Court of Appeal, Fourth Appellate District, affirming the denial of a Supplemental Petition for Writ of Mandate below, dated October 29, 2002, is reproduced in Petitioners' Appendix A. The unpublished order of the California Supreme Court, denying Property Owners' petition for review, dated January 22, 2003 concluded the liteny of appellate activity on this case. It is reproduced in Petitioners' Appendix E. But for this Petition, the case is final in all respects.

JURISDICTION

This Court has jurisdiction to review the judgment by a writ of certiorari pursuant to 28 U.S.C. § 1257(a) (1988). The order of the California Supreme Court denying Property Owners' petition for review was entered on January 22, 2003. This petition is therefore timely pursuant to 28 U.S.C. § 2101(c) (1988) and Sup. Ct. R. 13.1.

CONSTITUTIONAL AND FEDERAL COMMON LAW PROVISIONS

The Supremacy Clause, Article VI, Clause 2 of the United States Constitution, and the Fifth and Fourteenth Amendments to the United States Constitution are implicated. This Court's decisions establishing the federal common law that limited land use exactions by municipalities to avoid paying just compensation through eminent domain are relevant. *Nollan v. California Coastal*

Comm., 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), are the lead cases.

STATEMENT OF THE CASE

This is a case where the City cooperated with MSCE, a shopping center seeking to expand, in the formation of a cost reimbursement district for the purpose of enabling MSCE to fund the road and drainage infrastructure necessary to serve the shopping center's pending expansion project with the understanding that it would thereby obtain reasonable reimbursement for public improvements to be used by others, such as Property Owners, when and if their property ever developed. Two assessments resulting in liens against Property Owners' undeveloped property were made under this district, totaling over $950,000.00, such that if Property Owners sought to pull a building permit for work valued over $20,000.00, such lien would have to be paid. These original two assessments are not at issue in this case, since Property Owners, for various reasons, chose not to challenge those assessments.

Thereafter, the City determined to condemn a right of way for a major street right through the middle of Property Owners' undeveloped property, as depicted in the drawing reproduced in Petitioners' Appendix-78 [hereinafter Appendix is "App."], paid a condemnation award, and then sought to charge the full amount of the condemnation

award and expenses back as a recorded lien against Property Owners' property.[1]

This was done on the apparent (but erroneous) theory that if Property Owners had desired to develop their property before MSCE, they would have been required to dedicate (without compensation) the same property for roadway purposes. In sum, City handed Property Owners $440,000.00 over their original estimate for the right of way, and then took over $546,000.00 back through the Addendum to the Assessment, by amending and increasing the lien on their property.

Naturally, Property Owners objected, and filed *Abrams v. City of San Diego*, case number 655468 in the Superior Court of California, County of San Diego, Central Division, seeking a Writ of Mandate to force the City to rescind the assessment.

A. Factual Background

In this case Property Owners, owners of a nine-acre parcel of property in the Mira Mesa area of the City of San Diego, had the misfortune to be located directly adjacent to a 23.8 acre parcel owned by MSCE.

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[1] The details are somewhat complicated because as part of the road project, some drainage improvements to the remainder of Abrams' property were completed. At the end of the day, the monies Abrams received from the City for street right of way had been recouped by the City by a commensurate lien against Abrams' remaining property.

Property Owners had no present intention of developing their property. MSCE, on the other hand, had immediate intentions to subdivide and expand its shopping center, and in furtherance of that goal sought to obtain approval of a subdivision map.

Part of the subdivision map review process involved an analysis of the on site and off site physical improvements required for the project. In this case, City officials determined that Mira Mesa Boulevard needed to be widened, Galvin Avenue needed to be widened, and a new major street, ultimately called Westview Parkway, needed to be constructed.

MSCE obtained approval of its tentative subdivision map with a number of conditions which included the improvements to Mira Mesa Boulevard and Galvin Avenue, and the construction of Westview Parkway.

When the project was proposed, there were two potential alignments for Westview Parkway and Galvin Avenue. One followed the property line between Property Owners' and MSCE's respective properties, and the alternate would be largely on Property Owners' property, consuming approximately two of the nine acres, and cutting Property Owners' property up into three pieces, one of which would abut MSCE's property, and another of which would be virtually useless because of its small size. [App.-78]

The record contains no evidence as to why the alternative alignment was selected, but as this matter has evolved, a significant reason has become apparent.

The City of San Diego has developed a pattern of circumventing the eminent domain process for the acquisition of private real property for public use in exchange for just compensation, as contemplated in Title 7 of the California Code of Civil Procedure, sections 1230.010, *et seq.*, by either requiring dedications or exactions in the land use process, or if the person or entity from whom the property is to be taken is not a current applicant for permission to develop, by proclaiming that the property is "benefitted" by the development such that an assessment lien can be placed upon it.

In this case, the vehicle for the creation of the assessment lien was a "cost reimbursement district," pursuant to which the City of San Diego required the developer, MSCE, "front" the cost of the improvements, including Westview Parkway and Galvin Avenue, with the understanding that Property Owners and other property owners in the area would be required to "reimburse" MSCE for a portion of those costs. These reimbursements, sometimes called "exactions", would be in the form of liens on the properties, payable if any development application over $20,000.00 were submitted at any time within the next twenty years. The liens increased by accrual of seven per cent interest, compounded annually.

An additional aspect of the policies of the City of San Diego is that somewhere along the line a custom evolved, which was that it could be assumed, without further analysis, that any property that suffered a condemnation of any portion thereof for road improvements was "benefitted" by the portion of the road improvements located on

that property.[2] One could reasonably speculate this "assumption" arose from, among other things, the case of *White v. County of San Diego*, 26 Cal.3d 897 (1980), wherein the California Supreme Court upheld an assessment against property owners on either side of Mission Gorge Road for improvements to the road consisting of widening and the installation of medians and signals. In that case, the Supreme Court specifically approved of an approach which surcharged those properties whose frontages were taken by condemnation but did not charge those properties whose owners dedicated their frontage strips.

Unfortunately, somehow officials of the City of San Diego and the land use development consultants who work with them allowed the holding in *White* to be translated into a "rule of thumb," hereinafter referred to as the "unfounded allocation presumption," that if real property was condemned for road purposes leaving a remainder parcel, the remainder parcel was "benefitted" to the extent of the cost of the condemnation, and the proportion of the cost allocable to the remainder parcel was that represented by the portion taken compared to the portion taken from the adjoining property.

Put another way, if the center of the new road goes down the property line between two properties, they share the cost equally, but if the road is fully on the property of one property owner, going down the edge adjacent to the other property, the property owner upon whose property

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[2] An assumption not supported by reality as the Court can see from the geometry of the property here. See, App.-78. Here, it is seen that the MSCE expansion was a great detriment not a benefit.

the road is built bears the entire cost of site acquisition and development regardless of the geometry of the road design. This approach is not only illegal generally, but, as will be shown herein, is in direct violation of the City Council's own Policy 200-1.

Earlier MSCE took the position in the California state courts that the aforementioned "unfounded allocation presumption" results in the "proportionality" required by the Fifth Amendment of the United States Constitution as described in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Ehrlich v. City of Culver City*, 12 Cal.4th 854 (1996), such that no further demonstration of proportionality need be made.

In this case, that meant that if MSCE was shrewd enough to cause the alignment of Westview Parkway and Galvin Avenue to veer entirely onto Property Owners' property, MSCE could avoid having to pay for Westview Parkway and Galvin Avenue and save the other property owners in the cost reimbursement district from sharing in this expense. The City of San Diego cooperated fully with MSCE's plan, in violation of its own policy, number 200-1.

In connection with MSCE's expansion, the MESA SHOPPING CENTER EAST COST REIMBURSEMENT DISTRICT NO. 4045 ("the DISTRICT") was purportedly formed and implemented in 1990 pursuant to San Diego Municipal Code § 62.0208. This process generally permits the first developer of property to fund the construction of public improvements benefitting not only that property, but other adjoining property and to secure a claim for proportionate reimbursement from other benefitted owners, if and when they develop.

Once the project was underway, MSCE and City decided that Westview Parkway and Galvin Avenue should be entirely within the confines of Property Owners' property, resulting in a division of the property into two small parcels and one larger parcel. In July of 1990, MSCE requested that additional costs be charged to Property Owners' property, increasing their total cost to $998,299.00. Property Owners also did not object to this first amendment, which included a budget for $200,750.00 for acquisition of right-of-way across Property Owners' property, and a budget for the installation of a major storm drain across Property Owners' property (as dictated by MSCE's subdivision map).

The effect of this was that the cost reimbursement district was formed, and "exactions," in the form of liens placed on Property Owners' property were made, first in the amount of $570,948.00 and then increased to the total amount of $998,299.00. Because of various circumstances, Property Owners did not legally attack these two exactions.

Property Owners had not been seeking to develop their property, so City could not use its usual tactic of requiring dedication of the road right-of-way as it passed Property Owners' property.[3] The only way City could obtain the right-of-way of Westview Parkway and Galvin Avenue that would occupy some 25% of Property Owners' property, in a time frame suitable to MSCE, was to condemn it. This

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[3] Such a dedication would not have passed constitutional muster in any event, given the ultimate alignment the CITY chose for the road, which was entirely inside the property and consumed approximately 25% of its area.

condemnation was litigated in state court, resulting in an award of $641,358 to Property Owners.

In June 1992, City held a hearing on the increased cost and its allocation among the Property Owners. Property Owners opposed the change of plans and the resulting proposed increase by letter and at the hearing. At the hearing, Property Owners sought a continuance which was denied, and the city council, with one dissenting vote, approved the amendment to the cost reimbursement assessment against Property Owners.

Property Owners therefore sought a Writ of Mandate, for the purpose of causing City Council to conduct a full and fair hearing as to the issue of whether Property Owners were being liened to an extent disproportionate to the impact on their property.

Ultimately, the trial court disagreed with City's approach as to proportionality, ruling that it was up to City of San Diego to demonstrate a factually sustainable proportionality between the effects of the increased costs of $545,251.18 assessed through the cost reimbursement district on June 23, 1992 and the exaction with which Property Owners had taken issue.

MSCE appealed, and this Court affirmed that determination, in case number D029343.

The effect of the Opinion in D029343 was that City Council would be required to hold a proper hearing on the question of the proportionality of the benefits related to the exaction, so as to create a record permitting judicial review of that question, if necessary.

The Opinion stated, at 11:

> To impose a cost reimbursement lien on Property Owners's property, the City must prove that an essential nexus exists between the assessment and the benefit of public improvement and that the amount of the assessment is roughly proportional to the benefit to the property of the street improvement. Because there is no evidence of proportionality, the trial court correctly determined that insubstantial evidence supported the action by the city council. [App.-32]

City then scheduled another hearing on the question of the amended third exaction, Property Owners specifically took issue with the question of proportionality.

On June 19, 2000, the City Council held its regular meeting, which included, as item 205, "Addendum to the Mesa Shopping Center East Cost Reimbursement District Agreement" with a City Manager's recommendation to adopt a resolution "[r]e-affirming [sic] that a factually sustainable proportionality exists between the June 23, 1992 amendment to the Mesa Shopping Center East Cost Reimbursement District and the benefit to the Property Owners/Bohannon property."

Property Owners were allowed two minutes on the record, the transcript of which only takes up two pages, and City adopted the resolution, based on a report from a "public finance consultant," (the "Fournier Report") which included a purported engineering analysis and an appraisal of the land. The Fournier Report contained a purported "benefit analysis" involving only Property Owners' property, which concluded with the opinion that the value of Property Owners' property had risen based on the "improvements" hence had been benefitted.

City's consultant noted that this condemnation award was $440,000.00 more than the budget as of the first amendment. This consultant, Fournier, then sums up what City did:

> Accordingly, on April 20, 1992, the cost reimbursement engineer, Wildan Associates, prepared and submitted its report regarding the final cost of improvements and right-of-way acquisition, and proposed spreading the costs that had increased from that which was estimated at the time of the first amendment to the cost reimbursement district. It had by that time been determined that the cost of right-of-way acquisition, including attorney's fees and other litigation expenses, was $696,905.66, of which $641,358 was the right-of-way compensation agreed to be paid and actually paid to the owners of the Property Owners/Bohannon parcel. This represented a total increase of $496,000 from the estimate for right-of-way acquisition costs which was used at the time of prior amendment to the reimbursement district. **This *entire amount*, together with approximately $49,000 of the increase in overall improvement costs experienced by the district, was then assessed to the Property Owners/Bohannon parcel by an amendment to the district passed by the City Council on June 23, 1992.** [Emphasis added.]

At the June 19, 2000 hearing, the additional lien was approved with no record whatsoever containing an actual demonstration of any sort of calculation regarding proportionality as between the various properties benefitted by the Westview Parkway and Galvin Avenue improvements.

Property Owners therefore filed a Supplemental Petition for Writ of Mandate, seeking to have the trial court tell City that it had used the wrong standard. The trial court denied the Supplemental Petition, holding:

> The Court of Appeal's Opinion does not require a calculation of the traffic that petitioners' parcel might someday generate. The better way to identify benefit is to determine what a willing buyer would pay for the property before and immediately after the improvements were constructed, as the City has done. Using this standard of proportionality, the record establishes a substantial evidence of proportionality. . . . Nor has a procedural due process violation been shown. . . .

This Appeal timely followed.

B. Procedural Background

Property Owners first filed their lawsuit on August 24, 1992, seeking to invalidate the third exaction. Initially, the trial court denied the petition, and after an appeal on procedural issues having to do with the Statute of Limitations, in case number D019566, this matter was remanded to the trial court by the Court of Appeal with directions to address the administrative mandamus petition on the merits.

On June 30, 1997, the trial court entered a judgment which found, among other things,

> 1. There is no relevant evidence in the record of benefits to the parcel that a reasonable mind might accept as adequate to support the conclusion that there was rough proportionate benefit to the parcel; . . . [App.-22]

The trial court then ordered, adjudged and decreed:

> That a peremptory writ of mandate shall issue under the seal of this court commanding respondent, the City of San Diego, including all its agencies, departments, subdivisions, officers, employees, and agents, within the time specified for a return to the writ to demonstrate a factually sustainable proportionality between the effects of the increased costs of $545,251.18 assessed through the Cost Reimbursement District on June 23, 1992, and the exaction. [App.-23]

MSCE appealed, and in case number D029343, the Fourth District Court of Appeal, Division One, affirmed.

The response to this appeal by the City has been described on page 10.

Property Owners then timely filed a Supplemental Petition, which was denied, on March 30, 2001. [App.-35, 36]

Property Owners then filed this Appeal, case number D038402.

In an unpublished Opinion, on October 24, 2002, the Court of Appeal affirmed the judgment of the trial court [App.-1-21], on the basis of four fundamental concepts:

1. At page 12, the Opinion states "the *Dolan/Nollan* [*Dolan v. City of Tigard*, 512 U.S. 374 (1994)/*Nollan v. California Coastal Commission,* 483 U.S. 825 (1987)] test requires that the assessment be roughly proportional to the **benefit** received by the property." (Emphasis added.) There is no previous decisional law support for this conclusion. The Opinion effectively concedes it made up the new rule.

2. At page 14, the Opinion states "Because Abrams' timely-filed petitions challenged only the June 1992

increase in the amount of the costs reimbursement . . . he effectively waived any argument that those district improvements did not benefit his property or were otherwise proper." Again, there is no previous decisional law support for the conclusion that if the initial assessment is not challenged, the public agency has *carte blanche* to make whatever project changes and further assessments it deems appropriate. In this case, the project was changed after the first two assessments to shift the burden of the right-of-way entirely onto Appellants. Both *Dolan* and *Ehrlich* [*Ehrlich v. City of Culver City*, 12 Cal.4th 854 (1996)] deal with each separate assessment individually.

3. At page 17, the Opinion, in reference to the City's reference to the Tagg Appraisal and the Fournier report, states "In so doing, City made the required individualized determination regarding the degree of connection between the exaction imposed (e.g., the cost reimbursement lien) and the projected impact (e.g., benefit to owners' property) of the district improvements" citing *Ehrlich v. City of Culver City*, *supra*, 12 Cal.4th 854, 879-880; and *Dolan v. City of Tigard*, 512 U.S. 374, at 391, 395-96 (1994). Any financial "benefit" attributable to the right-of-way acquisition was properly the subject of the eminent domain action, such that any such analysis had already been waived by the earlier settlement. Moreover, neither *Dolan* nor *Ehrlich* mandate the unilateral use of appraisal opinions as a basis for exactions.

4. The Opinion states, at 18, that "City was not required to apply the rough proportionality test based on evidence regarding current and/or projected vehicle traffic on Westview Parkway and Galvin Avenue" noting that Property Owners did not cite any case law supporting the idea that rough proportionality of exaction should be based on relative use of the improvements for which the exaction is made. However, neither the Opinion nor

the briefing by City or Real Party provide any previous decisional authority that contradicts this view, and, in fact, it demonstrates misapplication of City Policy 200-1 at footnote 8, which distinguishes between-types of uses of road improvements.

After the Court of Appeals denied Property Owners' Petition for Rehearing, Property Owners timely petitioned the California Supreme Court for Review on December 6, 2002. [App.-95-122] The state supreme court denied the petition on January 22, 2003 (Justice Brown being of the opinion that the Petition should be granted), leaving Property Owners with the present petition for a writ of certiorari to the California Court of Appeal as their sole remaining recourse. (Order Denying Petition for Review reproduced in Petitioners' App.-37.)

REASONS FOR GRANTING THE PETITION

A grant of certiorari is necessary in this case to answer the question of whether a public agency can exercise eminent domain powers to take real property interests, and then either pay no compensation or "assess" back the acquisition cost to the property owner, based on a contention that the project for which the taking is effectuated is a "benefit," without violating the prohibition found in the Fifth Amendment of the United States Constitution against the taking of property without the payment of just compensation as described by *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

In his dissent in *White v. County of San Diego*, *supra*, 26 Cal.3d 897, the late Justice Mosk, a highly regarded

California jurist with decades of service on the California Supreme Court, made the following comment, at 910:

> The county's scheme is a cynical method of automatically shifting the cost of an improvement benefitting the public onto the backs of a few landowners because of the fortuity of their location. Not only do the landowners lose a portion of their property, but they are then deprived of the constitutionally required compensation for the taking. (Cal.Const., art. I, § 19.) I strongly disapprove of this acquisitive device by which a public entity, in order to obtain private property, puts funds therefor in a landowner's pocket – and then proceeds to pick the pocket. [App.-87]

In *Ehrlich*, the California Supreme Court embraced a metaphor, similar to the one in frequent use by the United States Supreme Court, as follows:

> One of the central premises of the takings clause is that truly public burdens will be publicly borne . . . the *Nollan* test helps to secure that promise by assuring that the monopoly power over development permits is not illegitimately exploited by imposition of conditions that lack any logical affinity to the public impact of a particular land use. (*Ehrlich v. City of Culver City*, *supra*, 12 Cal.4th 854, at 876.) [App.-87]

Please see also *Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (2001):

> The Fifth Amendment forbids the taking of private property for public use without just compensation. We have recognized that this constitutional guarantee is "'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the

> public as a whole.'" *Penn Central, supra,* at 123-124, 98 S.Ct. 2646 (quoting *Armstrong v. United States,* 364 U.S. 40, 49, 80 S.Ct. 1563, 4 L.Ed.2d 1554 (1960)).

The most egregious aspect of this whole proceeding, however, is the fact that in contrast to the property owners in *Nollan, Dolan,* and *Ehrlich,* Property Owners have never been applicants for any project that would have justified any taking of their property, much less dramatic strips out of the middle of their property "for its benefit." The decisions to shift the right-of-way rested solely with MSCE and the City, which rightfully should bear the expense of the street.

As noted, the Court of Appeal Opinion in this case appears to hold that so long as a public agency can get an appraisal that indicates the property owners' remaining property interest has increased in value, compensation need not be given for the taking of real property, or if it is, it can simply be "assessed" back. The Court, therefore, should grant the requested writ of certiorari to establish that no taking of real property for public benefit may be had without payment of just compensation, such that public agencies, such as the City in this case, cannot require dedications or take rights of way without paying for them, under the guise of benefitting the abutting property owner.

I. THE COURT OF APPEAL ERRED IN EQUATING "BENEFIT" WITH "ROUGH PROPORTIONALITY" AS A BASIS FOR TAKING PROPERTY WITHOUT JUST COMPENSATION.

In *Ehrlich v. City of Culver City*, *supra*, 12 Cal.4th 854, the California Supreme Court summarized the current law of California this way, at 859:

> As we explain, we conclude that the tests formulated by the high court in its *Dolan* and *Nollan* opinions for determining whether a compensable regulatory taking has occurred under the takings clause of the Fifth Amendment to the federal Constitution apply, under the circumstances of this case, to the monetary exaction imposed by Culver City as a condition of approving plaintiff's request that the real property in suit be rezoned to permit the construction of a multi-unit residential condominium. We thus reject the city's contention that the heightened takings clause standard formulated by the court in *Nollan* and *Dolan* applies only to cases in which the local land use authority requires the developer to dedicate real property to public use as a condition of permit approval.
>
> We arrive at this conclusion not by reference to the constitutional takings clause alone, but within the statutory framework presented by the Mitigation Fee Act. ([California] Gov. Code, § 66000 et seq.) We will conclude in this case that, in order to avoid substantial questions concerning the constitutional sufficiency of the legislative standard embodied in the act, the tests formulated by the high court in its *Dolan* and *Nollan* opinions for determining when a regulatory taking has occurred apply here to the act's

> requirement that the local regulatory authority demonstrate a "reasonable relationship" between the monetary exaction and the public impact of the development.
>
> We thus interpret the act's "reasonable relationship" standard, as applied to the development fee at issue in this case, as embodying the standard of review formulated by the high court in its *Nollan* and *Dolan* opinions – proof by the local permitting authority of both an "essential nexus" or relationship between the permit condition and the public impact of the proposed development, and of a **"rough proportionality" between the magnitude of the fiscal exaction and the effects of the proposed development.** (Emphasis added.)

The "benefit" test described at page 12 of the Court of Appeal opinion in this case is simply not the same as the test described in *Ehrlich* which refers to "effects of the proposed development." The Court of Appeal flat out made up a new rule which is not supported by current legal authority and is plainly in conflict with *Dolan* on the Federal level, and *Ehrlich* in California.

II. THE COURT OF APPEAL ERRED ON HOLDING THAT FAILURE TO OBJECT TO THE INITIAL ASSESSMENT WAIVES SUBSEQUENT OBJECTIONS TO CHANGES IN THE PROJECT OR INCREASES IN THE ASSESSMENT.

The record reflects that when the original assessment district was implemented and the first supplemental assessment was initiated, the right-of-way went alongside, as opposed to through, Property Owners' property.

However, at page 14, the Opinion states "Because Property Owners' timely-filed petitions challenged only the June 1992 *increase* in the amount of the costs reimbursement . . . he effectively waived any argument that those district improvements did not benefit his property or were otherwise proper." Again, there is no previous decisional law support for the conclusion that if the initial assessment is not challenged, the public agency has *carte blanche* to make whatever project changes and further assessments it deems appropriate without any risk of legal challenge. As logic and sound public policy would dictate, just the opposite is true. Project changes, in all fairness, must re-open the public's right to challenge – lest the fox have an open door to the henhouse. In California, perhaps the best example is the administration of the California Environment Quality Act. Re-opening on charges in common. In this case, the project was changed after the first two assessments to shift the burden of the right-of-way entirely onto Appellants.

The Opinion fails to account for the fact that after the second assessment, at the request of MSCE, the project was changed, to shift the right-of-way from the boundary between MSCE's and Property Owners' respective properties, **entirely onto Property Owners'** property, as depicted in the drawing incorporated into Appellants' Reply Brief, reproduced in Petitioners' App.-98.

III. THE COURT OF APPEAL ERRED IN AFFIRMING THE USE OF APPRAISAL REPORTS TO DEMONSTRATE MARKET VALUE INCREASE AS A BASIS FOR A FINDING OF "BENEFIT."

At page 17, the Opinion purports to find that the City made the required individualized determination regarding the degree of connection between the exaction imposed (e.g., the cost reimbursement lien) and the projected impact (e.g., benefit to Property Owners' property) [sic] of the district improvements, erroneously citing *Ehrlich v. City of Culver City*, *supra*, 12 Cal.4th 854, 879-880; and *Dolan v. City of Tigard*, *supra*, 512 U.S. 374, at 391, 395-96.

As an initial matter **the substitution of the word "benefit" for "effects of the development"** on the basis of the fact that Property Owners were not seeking approval of a project is entirely unsupported by any statutory or case law, and the Opinion cites none. Patently, there is and could be no honest justification for such sleight of hand when Property Owners' property was seized by eminent domain, but through this ruse perpetrated by the City, Property Owners were denied just compensation.

No reported case refers to, much less mandates, the unilateral use of appraisal opinions as a basis for exactions.

A review of the record shows that the sole basis for the finding of benefit to Property Owners was the opinion of Randy Tagg, an appraiser, that the property had been enhanced in great value by the totality of the improvements including both the prior two assessments and the second increase, without segregating one from another.

The Opinion provides no legal authority to support the proposition that an appraisal opinion indicating an enhancement of *market value* of the Property Owners' property, standing alone, is a sufficient basis for a finding of rough proportionality. After all, in California it is very common for market values to increase (or decrease) significantly, and abruptly, from time to time for reasons wholly unrelated to public improvements, i.e., pure market conditions, the economy, employment, foreign crisis, etc. A general appraisal is a poor indicator of the impact of one isolated growth factor.

The Opinion beginning at page 17 entirely accepts, without question the Tagg appraisal, and entirely omits to consider that such appraisal was not grounded in the reality of an actual development proposal, as opposed to speculation as to what the City might or might not approve. Perhaps more importantly, in a normal taking case where appraisal testimony is taken, it is tested through cross-examination and the defense opinion testimony. In this case the record makes clear that there was no discussion of the sense or underpinnings of Tagg's appraisal testimony at all, since the proceedings were nothing more than a "rubber stamp" exercise.

IV. THE COURT OF APPEAL ERRED IN DECLINING TO CONSIDER THE TRAFFIC EFFECTS INVOLVED IN REAL PARTIES DEVELOPMENT AS THE PROPER LOGICAL BASIS FOR ROUGH PROPORTIONALITY ANALYSIS.

The Opinion states, at 18, that "City was not required to apply the rough proportionality test based on evidence regarding current and/or projected vehicle traffic on

Westview Parkway and Galvin Avenue" noting that Appellant Property Owners did not cite any case law supporting the idea that rough proportionality of exaction should be based on relative use of the improvements for which the exaction is made.

However, neither the Opinion nor the briefing by City or MSCE provided any previous decisional authority that contradicts this view, and, in fact, the Opinion demonstrates misapplication of City Policy 200-1 at footnote 8, which distinguishes between types of uses of road improvements.

The Opinion appears to assume that the strip of Westview Parkway and Galvin Avenue that trisected Appellants' property was "the portion of the street system which provides for local traffic movement and access to abutting property" as opposed to:

1. Streets which facilitate the movement of through traffic, or serve in a collector function and are of benefit to the general area as to which, pursuant to Council Policy number 200-1, "this community should share in the costs" or

2. Features which expedite the movement of large volumes of traffic or which provide major service for other areas are of general benefit to the City which, pursuant to Council Policy number 200-1, "merit funding from tax sources."

Absent consideration of a traffic study, it would not be possible for the City to figure out how a road improvement should be financed. When there is doubt about the specific proportion of use between the public and the property

owner, it should be in favor of public funding, not assessments of individual property owners in amounts unrelated to their use of the resulting streets.

When one compares the 696 Average Daily Trips[4] that would be attributable to the 87 maximum residential units on Appellant Property Owners' property, with the 25,000 Average Daily Trip cap, and the 8,000 existing Average Daily Trips as of April, 1998, the idea that 696 trips, which are, per the record, 8.7% of current, and 2.8% of projected trips should account for 100% of the right-of-way cost is absurd.

One would think logically that a comparison of street usage between the subject properties, the properties in the district, and the general public would be necessary for any determination of proportionality. The Opinion nowhere describes how City satisfies the mandate of *Ehrlich*: " . . . proof by the [City] . . . of a 'rough proportionality' between the magnitude of the fiscal exaction and **the *effects* of the proposed development.**" (*Ehrlich v. City of Culver City*, *supra*, 12 Cal.4th 854, at 859, emphasis added.)

The Opinion itself even cites a passage from *White v. County of San Diego*, *supra*, 26 Cal.3d 897, 904 "Property may be specially assessed only for improvements that provide it benefits beyond those received by the general public." Absent consideration of traffic patterns, no legitimate determination of the benefit of a road improvement

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[4] Average Daily Trips per Dwelling Unit times the number of expected dwelling units (or other users) is the fundamental yardstick for design of circulation systems in City.

can be made, hence the Court of Appeal was entirely in error.

V. THE COURT OF APPEAL ERRED IN USING "BENEFIT" AS A BASIS FOR PROPORTIONALITY DETERMINATION AS OPPOSED TO "THE EFFECTS OF THE PROPOSED DEVELOPMENT" AS MANDATED BY *DOLAN* AND *EHRLICH*, RESULTING IN INJUSTICE.

The Court of Appeal's slippage into "benefit" terminology at page 10 of its earlier March 6, 2000 Opinion and in the entirety of its October 29, 2002 Opinion is simply not faithful to the mandates of *Dolan*, *supra*, or even *Ehrlich*, *supra*. The Court of Appeal accurately **quoted** the *Ehrlich* mandate at the bottom of page 9 and the top of page 10 of the March 6, 2000 Opinion [App.-31] as ". . . agency must prove . . . a 'rough proportionality' between the magnitude of the fiscal exaction and the **effects** of the proposed development," (emphasis added) and then without explanation segued to the outdated "benefit" language of the abrogated *White* case, which apparently has now become the foundation for the decision in the current Opinion. [App.-31 (middle paragraph)]

While it does not appear that *White* has yet been expressly disapproved, its bald conflict with the more recent trio of cases is patent, and this is the time for its demise. In *Ehrlich*, the California Supreme Court embraced the Supremacy Clause (Article VI of the United States Constitution) as never before in land use matters, and the supremacy of *Dolan/Nollan* is beyond doubt.

The Opinion notes that *Ehrlich* held ". . . when [government] imposes special, discretionary permit conditions

on development by individual property owners . . . *Nollan* and *Dolan* require that such conditions, whether they consist of possessory dedications or monetary exactions, be scrutinized under the heightened standard." (*Ehrlich v. City of Culver City, supra*, 12 Cal.4th 854, at 881.)

Despite the recitation of the heightened scrutiny standard, the Court of Appeal erroneously declined to actually apply it, and instead, at least as to San Diego County, reaffirmed the current policies that allow the taking of real property without compensation from property owners who are not land use applicants, based on notions of "benefit" rather than "effect" which do not involve comparison to the public benefit from the taking.

Finally, Property Owners submit that a writ of certiorari is appropriate even though the case is not published because it is clear that many public agencies with eminent domain power are aware of the position of the Court of Appeal that is described in its opinion, and are, on a daily basis, making "taking" decisions based on the very analysis upon which it relies, in violation of the constitutional rights of persons such as Property Owners.

CONCLUSION

For the reasons set forth above, the Court should grant the petition for a writ of certiorari in this matter.

The "benefit" duplicity employed by California local government and utter disregard for the principles of *Dolan* are in full swing. Many other landowners are being denied their constitutional rights. This Court will never find another case like this that plainly demonstrates the evils

in play. The schemes grow more complex. Now is the time to rein in the abuses.

Dated: April 22, 2003

Respectfully submitted,

LAW OFFICES OF LOUIS E. GOEBEL
LOUIS E. GOEBEL
Counsel for Petitioners
Clem Abrams and
John Bohannon

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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL,
FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

CLEM ABRAMS et al., Plaintiffs and Appellants, v. CITY OF SAN DIEGO, Defendant and Respondent.	D038402 (Super. Ct. No. 655468)
MESA SHOPPING CENTER EAST, Real Party in Interest and Respondent.	

(Filed Oct. 29, 2002)

APPEAL from a judgment of the Superior Court of San Diego County, Wayne L. Peterson, Judge. Affirmed.

Clem Abrams and John Bohannon (together Abrams) appeal a judgment denying their petition for a writ of mandate seeking to require the City of San Diego (City) to adjust the cost reimbursement lien it imposed against their property.[1] On appeal Abrams contends there is insufficient evidence to support City's decision increasing

[1] Although the trial court designated its decision in this case as an *order* denying Abrams's petition, the court's decision was in effect a final judgment that is appealable pursuant to Code of Civil Procedure section 904.1, subdivision (a)(1).

the amount of its reimbursement lien because (a) City did not property apply the *rough proportionality* test, and (b) there is insufficient evidence to support a finding of rough proportionality in the circumstances of this case. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND[2]

In 1987 City, by its city council (Council), approved Mesa Shopping Center East's (MSCE) development of its 23.8-acre site for residential and commercial purposes, subject to the condition that certain off-site public improvements be constructed. Those improvements included the construction of Westview Parkway, Galvin Avenue, and water and sewer facilities. The street improvements required rights-of-way over Abrams's property, which is adjacent to MSCE's property.

In February 1990 Council established a cost reimbursement district that included MSCE's property, Abrams's property, and other nearby properties benefiting from MSCE's public improvements.[3] MSCE would be reimbursed for part of the costs of those improvements if the other properties within the district were developed within 20 years. The initial estimated cost of those improvements was

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[2] In this section we restate much of the factual and procedural background section of our prior opinion in *Abrams v. City of San Diego* (Mar. 6, 2000, D029343) [nonpub. opn.].

[3] Government Code section 66487, subdivision (c) allows a local agency to establish a local benefit district for the "levy and collection of such charge or costs from the property benefited" to reimburse developers for construction of required improvements that benefit other property owners.

$2,830,809, of which MSCE would bear $1,401,115; the other district property owners would pay a certain share of the remaining costs if their properties were developed within 20 years. A cost reimbursement lien was imposed on each district property to secure the obligation to pay its share.[4] In February 1990 Council approved a cost reimbursement lien of $570,948 on Abrams's property. Abrams did not challenge that lien.

In September 1990 Council approved an increase in the cost reimbursement lien on Abrams's property to $998,299 to reflect additional improvements and an increase in the estimated improvement costs. The increased lien included an increase in the estimated cost of acquisition of rights-of-way on Abrams's property from $65,640 to $200,750. Abrams did not challenge that increased lien.

In August 1990 City filed a complaint in eminent domain against Abrams and other district property owners to condemn property required for MSCE's street improvements. Pursuant to a March 1992 settlement between City and Abrams, a judgment was entered condemning that part of Abrams's property required for the street rights-of-way and other improvements and awarding Abrams

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[4] As we noted in *Abrams v. City of San Diego* (Apr. 24, 1996, D019566) [nonpub. opn.], a cost reimbursement lien is a variation on the theory of special assessments in that one property owner (e.g., MSCE), instead of a government agency (e.g., City), advances funds necessary for public improvements, and the government agency (e.g., City) uses its power to supervise a subdivision by ordering equitable distribution of those costs among benefited property owners. (Gov. Code, § 66485 et seq.; see *San Marcos Water Dist. v. San Marcos Unified School Dist.* (1986) 42 Cal.3d 154, 161.)

$570,000 plus interest of $71,358.40 for the taking. The remainder of Abrams's property continued to be encumbered by the cost reimbursement lien.

In June 1992 Council approved an increase in the cost reimbursement lien on Abrams's property to $1,543,550.18, reflecting the actual costs of acquiring Abrams's rights-of-way in the condemnation action and other costs of MSCE's improvements. Abrams filed a complaint for declaratory and injunctive relief against City and a petition for writ of administrative mandamus against City and MSCE as the real party in interest. The trial court granted the requested writ and remanded the matter to City to show a factually sustainable proportionality between the effects of the cost reimbursement district improvements and the $1.543 million exaction or reimbursement lien against Abrams's property. On appeal by MSCE, we affirmed the trial court's judgment. (*Abrams v. City of San Diego, supra*, D029343.)

In June 2000 Council accepted a report by consultant Jerome Fournier and, based on that report, found that "a factually sustainable proportionality exists" between the amount of the June 1992 reimbursement lien against Abrams's property and the benefit of MSCE's improvements to that property. Fournier's report included copies of an appraisal by Randy Tagg and a development cost estimate by Rick Engineering Company. The report found that Abrams was relieved of future development costs because of MSCE's public improvements and therefore could immediately seek rezoning of the property from agricultural to multi-family dwelling use with a minimum density of 87 dwelling units. Tagg's appraisal showed that in June 1992 Abrams's property would have had a market value of about $2.4 million were it developed with 87

multi-family dwellings and a value of only $225,000 if MSCE's public improvements were not made and the property continued to be zoned for agricultural use. Thus, the property's value increase by over $2 million because of MSCE's public improvements. Furthermore, after deducting the $1.543 million total reimbursement lien from the property's $2.4 million value after MSCE's improvements, Abrams's property had an increase in net value to about $850,000 because of those improvements.

Abrams filed a supplemental petition for writ of mandate, arguing City did not comply with the trial court's judgment granting the writ of mandate because it did not show the requisite proportionality between the increased reimbursement lien and the benefit of the improvements to his property, and that a traffic study is required to show the required proportionality. The trial court denied the supplemental petition, stating:

> "The Court of Appeal's opinion does not require a calculation of the traffic that [Abrams's] parcel might someday generate. The better way to identify benefit is to determine what a willing buyer would pay for the property before and immediately after the improvements were constructed, as the City has done. Using this standard of proportionality, the record establishes substantial evidence of proportionality. . . . "

Abrams timely filed a notice of appeal.

DISCUSSION

I

Standard of Review

On review of an administrative decision that does not involve or affect a fundamental vested right, a trial court reviews the administrative record to determine whether the administrative findings are supported by substantial evidence and whether the agency committed any errors of law. (*301 Ocean Ave. Corp. v. Santa Monica Rent Control Bd.* (1991) 228 Cal.App.3d 1548, 1556.) On appeal, a reviewing court also applies the substantial evidence standard in reviewing an agency's factual findings. (*Ibid.*; *Desmond v. County of Contra Costa* (1993) 21 Cal.App.4th 330, 335.) In applying the substantial evidence standard of review, "we must examine all relevant evidence in the entire [administrative] record, considering both the evidence that supports the administrative decision and the evidence against it. . . . " (*Desmond, supra*, at p. 335.) Substantial evidence is evidence of ponderable legal significance that is reasonable in nature, credible and of solid value. (*Ibid.*) It has alternatively been described as relevant evidence that a reasonable mind might accept as adequate to support a conclusion. (*Ibid.*) We resolve all reasonable doubts and make all reasonable inferences in favor of the administrative findings and decision. (*Galante Vineyards v. Monterey Peninsula Water Management Dist.* (1997) 60 Cal.App.4th 1109, 1117.)

As we previously concluded in *Abrams v. City of San Diego, supra*, D029343, the cost reimbursement lien imposed on Abrams's property does not limit his ability to use the property and therefore does not involve or affect a fundamental vested right. Therefore, the trial court properly

applied the substantial evidence standard of review in this case in reviewing City's administrative findings and decision, and we apply that standard of review on appeal.

To the extent City or the trial court decided a question of law, we review that decision de novo and independently determine that question on appeal. (*Galante Vineyards v. Monterey Peninsula Water Management Dist., supra*, 60 Cal.App.4th at p. 1117.)

II

Heightened Scrutiny Standard Requiring Showing of Rough Proportionality Applies to Exaction Imposed in This Case

We concluded in *Abrams v. City of San Diego, supra*, D029343, that the legal standards set forth in *Nollan v. California Coastal Comm'n* (1987) 483 U.S. 825 and *Dolan v. City of Tigard* (1994) 512 U.S. 374 apply to the monetary exaction imposed by City in this case. In *Nollan*, residential property owners challenged a California Coastal Commission requirement that they grant an easement for public beach access across their beachfront property as a condition to approval of a building permit for construction of a larger house. (*Nollan, supra*, at p. 827.) *Nollan* concluded there must be an essential nexus between the exaction imposed and the effect of the permitted use of the property. (*Id.* at pp. 837-838.)

In *Dolan*, a commercial property owner challenged certain public floodplain and pathway dedications of her property that the City of Tigard required as a condition to approval of a permit for development of her property. (*Dolan v. City of Tigard, supra*, 512 U.S. at pp. 379-382.) Acknowledging *Nollan's essential nexus* requirement was

satisfied in its case, *Dolan* addressed the question of the required degree of connection between the exactions imposed by the city and the projected impact of the proposed development. (*Id.* at pp. 377, 386-388.) *Dolan* concluded that the *takings clause* of the Fifth Amendment of the United States Constitution, made applicable to the states through the Fourteenth Amendment, requires rough proportionality between the exactions imposed and the projected impact of the proposed development. (*Id.* at pp. 383-384, 391.) *Dolan* stated:

> "No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." (*Id.* at p. 391, fn. omitted.)

Dolan concluded the city "must make some effort to quantify its findings" in support of the required dedication "beyond the conclusory statement that it could offset some of the traffic demand generated." (*Id.* at pp. 395-396.)

The *Dolan/Nollan* test requiring heightened scrutiny also applies to monetary exactions imposed as a condition to issuance of a development permit in circumstances in which the Fifth Amendment takings clause applies. (*Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854, 859, 866, 876.) *Ehrlich* stated: "When [monetary] exactions are imposed . . . neither generally nor ministerially, but on an individual and discretionary basis, we conclude that the heightened standard of judicial scrutiny of *Nollan* and *Dolan* is triggered." (*Ehrlich, supra*, at p. 876.) It noted that *Nollan* was concerned with "the *nature* of the relationship between a proposed development and a governmental exaction" and *Dolan* was concerned with "the *degree* of the

required connection." (*Id.* at p. 879, original italics.) *Ehrlich* stated:

> "We view the [*Dolan*] requirement that the local government demonstrate a *factually* sustainable proportionality between the effects of a proposed land use and a given exaction as one which furthers the assurances implicit in the *Nollan* test that the condition at issue is more than theoretically or even plausibly related to legitimate regulatory ends." (*Id.* at p. 880, original italics.)

It concluded: "[W]hen a local government imposes special, discretionary permit conditions on development by individual property owners . . . *Nollan* and *Dolan* require that such conditions, whether they consist of possessory dedications or monetary exactions, be scrutinized under the heightened standard." (*Id.* at p. 881.)

As we concluded in *Abrams v. City of San Diego, supra*, D029343, because the cost reimbursement lien on Abrams's property was imposed by City on an individual and discretionary basis the heightened scrutiny standard of *Dolan/Nollan* applies, including the requirement that the monetary exaction (e.g., cost reimbursement lien) have a rough proportionality to the impact on (e.g., benefit of the public improvements to) Abrams's property. Although *Nollan, Dolan*, and *Ehrlich* involved circumstances in which dedications were required or monetary exactions were imposed to compensate for or mitigate negative impacts of the proposed developments, we conclude the *Dolan/Nollan* test also applies to cases in which monetary exactions are imposed for the positive impacts of public improvements on particular properties. In *White v. County of San Diego* (1980) 26 Cal.3d 897, the county imposed special assessments on properties to pay part of the costs

of widening and improving an adjacent street. (*Id.* at pp. 900-902.) The special assessments included the cost of acquiring rights-of-way. (*Id.* at p. 902.) Pursuant to the county's policy, each property was "assessed back" the amount paid for the right-of-way taken from that property, except those properties that had previously dedicated rights-of-way to the county were not so assessed. (*Ibid.*) Because of varying degrees of negotiation or litigation by property owners, there were disparities in the amount of compensation owners received for their rights-of-way and consequent disparities in the amounts assessed back to the properties of those owners for the right-of-way compensation. (*Id.* at p. 903.) *White* stated: "Property may be specially assessed only for improvements that provide it benefits beyond those received by the public. [Citation.]" (*Id.* at p. 904.) *White* concluded the record showed the project benefited all of the abutting properties by improving access, reducing congestion, improving traffic controls, improving drainage, and adding curbs, gutters, and sidewalks. (*Ibid.*) Although "an assessment must be generally proportional to benefits," the amount of each assessment need not be measured by the precise amount of benefit received by the property owner. (*Id.* at p. 905.) *White* stated:

> "In assessing the parcels from which the necessary land had not been dedicated, was it proper to measure the right-of-way assessment by the compensation paid for the strip taken? As indicated above, all the right-of-way strips, whether previously dedicated or acquired for the project, could reasonably be deemed to be of substantially the same worth in proportion to area and frontage and thus in proportion to the benefit to be

> received by the assessed parcel. The record does not show the extent to which the compensation paid may have departed from those proportionate values, but it was not unreasonable for the county to have assumed that such departures were due mostly or entirely to fortuitous variations in the processes of appraisal, negotiation, and litigation leading to the final determination of compensation. Assessing back the compensation avoided inequities based on such fortuities (e.g., making an owner who accepted the county's first offer contribute to an extraordinarily large judgment awarded a neighbor in a condemnation action). Speculation that the spreading of right-of-way costs on a basis other than assessment back might have resulted in correlating some individual assessments more closely with benefits does not invalidate the assessment methods used here, at least in the absence of mistake, fraud, or gross injustice. [Citations.]" (*Id.* at pp. 907-908.)

Accordingly, the court affirmed the trial court's judgment denying the property owners injunctive relief regarding the special assessments. (*Id.* at pp. 900, 909.) Although *White* preceded *Nollan*, *Dolan*, and *Ehrlich*, we nevertheless conclude that its general approach to reviewing special assessments remains valid. *White*'s requirement that a special assessment be *generally proportional* to the benefits received by a property from public improvements is equivalent to *Dolan*'s requirement that an exaction be *roughly proportional* to the impact of the development. (*White*, *supra*, at p. 905.) In circumstances in which a property receives special benefits from public improvements (in contrast to negative public impact caused by development of private property), we conclude a variation of the *Dolan*/*Nollan* test applies in a manner similar to

the *White* approach. The amount of a special assessment against a property must be generally or roughly proportional to the benefit received by the property from the public improvements funded by an assessment district. Because a cost reimbursement lien is a variation on the theory of special assessments, the *Dolan/Nollan* test applies in this case.

III

The Trial Court properly Denied Abrams's Supplemental Petition

Abrams contends the trial court erred by denying his supplemental petition for writ of mandate because City did not properly apply the rough proportionality test and did not provide substantial evidence to support its finding of rough proportionality between the June 1992 increase in the cost reimbursement lien and the effect his property will create because of the district improvements constructed by MSCE. Abrams appears to argue that the effect his property will have because of the MSCE improvements will be limited to creating increased vehicular traffic and there is no evidence the City considered that effect. However, in the context of a cost reimbursement district in which the assessment is imposed because of benefit to the property resulting from district improvements made by another property owner, the *Dolan/Nollan* test requires that the assessment be roughly proportional to the benefit received by the property. The issue is whether the cost reimbursement lien against Abrams's property is roughly proportional to the benefit to Abrams's property created by the district improvements.

A

In February 1990 City initially imposed a $570,948 cost reimbursement lien on Abrams's property. Abrams did not challenge that lien. In September 1990 City increased the amount of the reimbursement lien to $998,299 to reflect additional improvements and increase in the *estimated* costs of the improvements originally planned. Abrams did not challenge that increased lien. In June 1992 City increased the amount of the reimbursement lien to about $1.543 million to reflect the *actual* costs of acquiring rights-of-way from Abrams and constructing district improvements. Abrams's original and supplemental petitions challenged the June 1992 increase of about $545,000 in the reimbursement lien.

B

We initially note that the June 1992 increase in the reimbursement lien was *not* the result of any improvements not included in City's 1990 cost estimates. Rather, the June 1992 increase resulted from the fact that the *actual* costs of those improvements exceeded the original and amended cost *estimates* for those improvements. In particular, because Abrams apparently did not accept City's August 1990 amended estimate of $200,750 for acquiring his rights-of-way, the actual cost of that acquisition increased to $641,358.40 (per the stipulated condemnation award of $570,000 plus interest of $71,358.40).

Because Abrams did not timely challenge the fundamental nature of the improvements, including the acquisition of his rights-of-way, for which the cost reimbursement lien was imposed on his property, we believe he is precluded from arguing that the *cost*, whether estimated or

actual, of acquisition of his rights-of-way was not properly assessed to his property by means of a reimbursement lien. In *Abrams v. City of San Diego, supra*, D019566, we concluded the 90-day limitation period under Code of Civil Procedure section 1094.6 applied to City's imposition of cost reimbursement liens.[5] Because Abrams did not timely challenge the 1990 original and increased reimbursement liens imposed by City on his property for district improvements, which included the estimated costs for acquiring his rights-of-way, the amounts of those liens, and presumably the improvements underlying those amounts, cannot now be challenged by Abrams. Therefore, Abrams logically cannot challenge, as a general concept, the inclusion of the cost of acquisition of his rights-of-way as an element of the district improvements resulting in the liens against his property. Furthermore, he cannot challenge the fact that the district improvements, including the acquisition of his rights-of-way, benefited his property. Because Abrams's timely-filed petitions challenged only the June 1992 *increase* in the amount of the cost reimbursement lien imposed for the same district improvements, including the acquisition of his rights-of-way, he effectively waived any argument that those district improvements did not benefit his property or were otherwise improper.

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[5] Code of Civil Procedure section 1094.6, subdivision (e) provides that the 90-day limitation period applies to any "decision subject to review pursuant to [Code of Civil Procedure] section 1094.5 . . . revoking [or] denying an application for a permit, license, or other entitlement, imposing a civil or administrative penalty, fine, charge, or cost, or denying an application for any retirement benefit or allowance." A cost reimbursement lien imposed by City is in effect the imposition of an administrative charge or cost, subject to expiration in 20 years.

C

Regardless of any waiver or time-bar of Abrams's contentions, we nevertheless conclude City properly applied the rough proportionality test and provided substantial evidence to support its finding that the amount of the June 1992 increased reimbursement lien was roughly proportional to the benefit of the district improvements to Abrams's property.[6] Although the amount of the June 1992 increase was about $545,000, that amount cannot be considered in isolation or in disregard of the previously unchallenged portions of the reimbursement lien imposed on Abrams's property. The rough proportionality test requires that City weigh the benefit of district improvements to Abrams's property against the amount of the reimbursement lien. Because those district improvements did not vary in substance from the unchallenged September 1990 $998,000 reimbursement lien to the challenged June 1992 $1.543 million reimbursement lien, the additional $545,000 lien amount imposed against Abrams's property reflected only the actual, rather than the estimated, costs of those improvements and not any variation in the benefit of those improvements to Abrams's property. Therefore, the total benefit of the district improvements to Abrams's property must be weighed against the total amount of the lien, including the amount of the June 1992 increase, in applying the rough proportionality test. It would be illogical to weigh the total benefit of the

[6] Because Abrams does not contend on appeal that City did not show the *Nollan essential nexus* requirement was met, he has waived that issue for purposes of this appeal and we therefore do not discuss it.

district improvements to Abrams's property against only the amount of the June 1992 increase.

At the June 1992 hearing, Council considered Fournier's report, which incorporated Tagg's appraisal and Rick Engineering's development cost estimate. The report noted that in 1992 Abrams's property was zoned for agricultural use, which limited Abrams to improving it with only one residential unit. In a supplemental appraisal, Tagg appraised the value of Abrams's property in 1992 with its current agricultural zoning but without MSCE's district improvements to be only $225,000. If Abrams had sought to rezone the property and develop it for multi-family dwellings, he would have been required to make the improvements set forth in Rick Engineering's estimate, including those district improvements that ultimately were made by MSCE. After rezoning of Abrams's property and construction of the required improvements, his property could be developed with at least 87 multi-family dwellings. The report also noted that City would have required Abrams to dedicate, without compensation, rights-of-way for construction of Westview Parkway and Galvin Avenue. Tagg's appraisal concluded that the value of Abrams's property after MSCE's improvements was about $2.4 million, which exceeded the total reimbursement lien of $1.543 million by about $850,000. Had Abrams sought to develop his property with a minimum of 87 multi-family dwellings before MSCE constructed the district improvements, he would have had to incur improvement costs of $1.98 million, and after deducting that amount from its developed value of $2.3 million, his property's value would increase by only $320,000. Therefore, Fournier and Tagg concluded Abrams's property increased in value because of, and therefore benefited by,

the district improvements constructed by MSCE by an amount in excess of the total reimbursement lien imposed against Abrams's property. Fournier's report concluded: "The increase in the assessment to [Abrams's property] to reflect the increase in the cost of the right-of-way acquisition was directly related to the expected impact of development of [Abrams's property], and the benefits that [property] received as reflected by [Abrams's property's] resulting increased market value[,] which exceeds the total assessment." Based on this evidence, Council found that "a factually sustainable proportionality" existed between the June 1992 reimbursement lien and the benefit of district improvements to Abrams's property.

We conclude City properly applied the rough proportionality test. Its finding of "a factually sustainable proportionality" incorporates *Ehrlich*'s language test in interpreting *Dolan*, which language the trial court included in its judgment granting Abrams's original petition for writ of mandate. *Ehrlich*'s phrase "factually sustainable proportionality" is equivalent to the phrase "rough proportionality" used in *Dolan*. (*Ehrlich v. City of Culver City*, *supra*, 12 Cal.4th at p. 880.) By considering the evidence set forth in Fournier's report, Tagg's appraisal, and Rick Engineering's development cost estimate, City considered the specific impact of MSCE's district improvements on Abrams's property and weighed that impact against the June 1992 reimbursement lien imposed on his property. In so doing, City made the required individualized determination regarding the degree of connection between the exaction imposed (e.g., the cost reimbursement lien) and the projected impact (e.g., benefit to Abrams's property) of the district improvements. (*Id.* at

pp. 879-880; *Dolan v. City of Tigard*, *supra*, 512 U.S. at pp. 391, 395-396.)

We further conclude there is substantial evidence to support City's finding that the benefit of the district improvements to Abrams's property is roughly proportional to the amount of the June 1992 reimbursement lien imposed on Abrams's property. Based on Fournier's report, Tagg's appraisal, and Rick Engineering's development cost estimate, City reasonably concluded that the net value of Abrams's property increased as a result of the district improvements. Although City imposed a total reimbursement lien of $1.543 million on Abrams's property, the value of his property increased to about $2.4 million because of those district improvements, resulting in a net value of about $850,000 for his property. That $850,000 net value after the district improvements were made exceeded the $225,000 value of Abrams's property if those improvements had not been made and the property had remained zoned for agricultural use.[7] Furthermore, because the $2.4 million value of Abrams's property after MSCE's district improvements exceeded its $225,000 value before those improvements, Abrams's property value increased by over $2 million because of those improvements for which Abrams's property was assessed only $1.543 million pursuant to the July 1992 cost reimbursement lien. In addition, Abrams received $570,000 plus interest for condemnation of the street right-of-way over his property. Because no precise mathematical calculation

[7] That $850,000 net value also exceeded the $320,000 net value Abrams's property would have had if it had been developed before MSCE's improvements were made.

is required, City could reasonably conclude that the net increase in the value of Abrams's property showed there was a rough proportionality between the benefit of the district improvements to his property and the June 1992 reimbursement lien (including the $545,000 increase) it imposed on his property. Therefore, the trial court properly found that there was substantial evidence to support City's finding that the rough proportionality test was satisfied.

D

City was not required to apply the rough proportionality test based on evidence regarding current and/or projected vehicle traffic on Westview Parkway and Galvin Avenue. Abrams does not cite any case concluding that vehicle traffic impact studies are, as he asserts, the "only relevant evidence" and must be considered in applying the *Dolan/Nollan* test, and we do not find persuasive his argument in support of that conclusion. Assuming arguendo that Abrams's property, if developed for multifamily dwellings, would have little impact on the volume of current and projected traffic on those streets, City nevertheless could conclude the rough proportionality test was met because the test in the context of a cost reimbursement lien is the benefit to the assessed property, not the effect use of the property may have as a result of the district improvements. The evidence considered by City provided a sufficient evidentiary basis to support its finding that the benefits of the district improvements to Abrams's property exceeded, or were roughly proportional to, the June 1992 reimbursement lien it imposed on his property.

Abrams also argues that City was required to compare the proportionate benefit of the district improvements to Abrams's property with the proportionate benefit of those improvements to adjacent properties and the general public. However, neither *Dolan* nor *Ehrlich* expressly requires that comparison and we are not persuaded to interpret those cases to require that comparison. Abrams does not cite any case or other authority in support of his proposition.

Abrams also asserts that City's application of the rough proportionality test violated its own policy of assessing to property owners only part of the cost of street construction or other improvements. However, because Abrams did not raise this issue below, we conclude he has waived it for purposes of this appeal. (*City of Walnut Creek v. County of Contra Costa* (1980) 101 Cal.App.3d 1012, 1019-1020.) In any event, Council policy number 200-1, adopted in 1979, predated the decisions in *Nollan*, *Dolan*, and *Ehrlich* and therefore may be considered modified to the extent it is inconsistent with those cases.[8]

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[8] Council policy number 200-1 states in pertinent part: "Division of the cost involved in improving the City street system is based upon the following fundamental considerations: [¶] a. That portion of the street system which provides for local traffic movement and access to abutting property should be the responsibility of the property owners who receive the benefit. [¶] Streets which facilitate the movement of through traffic, or serve in a collector function, are of benefit to the general area, and this community should share the cost. [¶] Ordinarily, only features which expedite the movement of large volumes of traffic or which provide major service for other areas are of general benefit to the City and merit funding from tax sources." That policy further states: "Abutting property is responsible for improvements of local streets, or for that portion of collector and arterial streets which is equivalent to the width of a local street. [¶] . . . [I]mprovements include right-of-way,

(Continued on following page)

Furthermore, City properly applied the *Dolan/Nollan* rough proportionality test, and Abrams has not shown the City's application of that test in the use of the reimbursement district violates that policy.

DISPOSITION

The judgment is affirmed.

/s/ McDonald
McDONALD, J.

WE CONCUR:

/s/ Huffman
HUFFMAN, Acting P. J.

/s/ Haller
HALLER, J.

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grading, drainage structures, curbs, sidewalks, paving and landscaping. . . ."

IN THE SUPERIOR COURT OF
THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN DIEGO

CLEM ABRAMS, et al., Plaintiffs and Petitioners, v. THE CITY OF SAN DIEGO, etc. Defendants and Respondents.	) No. 655468) FINAL JUDGMENT GRANTING PETITION FOR WRIT OF MANDATE
MESA SHOPPING CENTER EAST, a Business Entity, Real Party in Interest.	) Date: March 21, 1997) Time: 8:45 a.m.) Dept.: 48) Trial: Not set

This matter came on for hearing on March 21, 1997, in Department 48, the Honorable Wayne L. Peterson, Judge Presiding. John L. Mullen, Deputy City Attorney, appeared for respondent City of San Diego; Asaro, Keagy, Freeland & McKinley, by Steven A. McKinley, appeared for real party in interest, Mira Mesa Shopping Center; there was no appearance for petitioner.

The court having read the briefs, reviewed the administrative record, and considered the arguments of counsel, hereby finds and determines as follows:

1. There is no relevant evidence in the record of benefits to the parcel that a reasonable mind might accept as adequate to support the conclusion that there was roughly proportionate benefit to the parcel;

2. That the test of *Doland v. City of Tigard*, 512 US 374 (1994) and *Nollan v. California Coastal Commission*, 483 US 825 (1987) applies, because Petitioners will not be required to pay the exaction (in the form of a lien) unless

Petitioners seek a building development permit for over $20,000.00 or record a final map by February 13, 2010. Hence, the local government has imposed a special discretionary permit conditioned on development by an individual property owner, not on a broad class of property owners in the form of a generally applicable assessment, requiring scrutiny under the heightened standard.

3. Petitioner has not disputed that the ninety-day statute of limitations under CCP 1094.6 has run as to costs assessed under the Cost Reimbursement District prior to June 23, 1992, in the amount of $998,299.00.

WHEREFORE, good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:

That a preemptory writ of mandate shall issue under the seal of this court commanding respondent, the City of San Diego, including all of its agencies, departments, subdivisions, officers, employees, and agents, within the time specified for a return to the writ to demonstrate a factually sustainable proportionality between the effects of the increased costs of $545,251.18 assessed through the Cost Reimbursement District on June 23, 1992, and the exaction.

IT IS SO ORDERED

Dated: 6/30/97

/s/ Peterson
JUDGE OF THE
SUPERIOR COURT
WAYNE L. PETERSON

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

CLEM ABRAMS, et al., Plaintiffs and Respondents. v. THE CITY OF SAN DIEGO, Defendant;	D029343 (Super. Ct. No. 655468)
MESA SHOPPING CENTER EAST, Real Party in Interest and Appellant.	

(Filed Mar. 6, 2000)

APPEAL from an order of the Superior Court of San Diego County, Wayne L. Peterson, Judge. Affirmed.

Mesa Shopping Center East (MSCE) appeals a grant of a petition for writ of mandamus in favor of Clem Abrams and John Bohannon (together Abrams). MSCE claims the trial court erroneously granted the writ because it improperly determined that the public improvement cost reimbursement lien the City of San Diego (the City) imposed on Abrams's property was disproportional to the benefit Abrams's property received from the public improvements. MSCE also claims Abrams waived his right to contest the formula used to calculate the amount of the lien. We affirm.

I

FACTUAL AND PROCEDURAL BACKGROUND

In 1987, the San Diego City Council approved MSCE's development of a 23.8-acre site for residential and commercial purposes. The development's approval was conditioned on the construction of public improvements, including a four-lane major street and water and sewer facilities. The City established a cost reimbursement district for the sharing of costs of the public improvements by the benefited property owners.

Abrams owned property adjacent to MSCE's property significantly impacted by MSCE's development; the required street improvements (Westview Parkway and Galvin Avenue) included a portion of Abram's property and divided it into three non-contiguous parcels.

In January 1989 the city attorney initiated the formation of the cost reimbursement district under which MSCE would be reimbursed for the costs of the public improvements by the benefiting landowners if those owners developed their land within 20 years. In April the City authorized the city manager to formulate the share each benefiting landowner would pay on development of its land.

In early 1990 the estimated cost of the public improvements required in connection with the development of MSCE's property was $2,830,809. MSCE would absorb $1,401,115 and the owners of the remaining benefited land would pay a designated share of the balance if they developed their land within 20 years. The share allocated to each benefited owner was secured by a cost reimbursement lien on the owner's land.

The original assessment to Abrams's property was $611,043 but was subsequently lowered to $570,948. The city council approved the cost reimbursement district on February 13, 1990, and a resolution of lien was filed the same day. Abrams did not challenge this resolution.

In July 1990 MSCE wrote to the City's Engineering and Development Department proposing that additional costs of $427,351 be charged to Abrams's property, increasing Abrams's total cost to $998,299. In September 1990 the city council adopted a resolution amending the cost reimbursement district. Abrams did not contest this increase.

In August 1990 the City filed a complaint in eminent domain against Abrams and other property owners to condemn the property to be used in the street improvements related to the MSCE development. The City also recorded a notice of lis pendens. On March 6, 1992, Abrams and the City entered into stipulation pursuant to which Abrams received $570,000 plus $71,358.40 in interest in "full, final, and just compensation . . . for the taking of said real property. . . . " The portion of Abram's property not taken by condemnation remained encumbered by the cost reimbursement lien.

In April 1992 the City informed Abrams of a new proposed amendment to the cost reimbursement district that would increase Abrams's obligation to $1,543,550.18. The calculation of the additional cost was based on the "Eight Owners" agreement, which set the percentage of responsibility for certain improvements. Pursuant to the Eight Owners agreement, MSCE and Abrams would share, 75 percent and 25 percent respectively, the cost of

construction of the street improvements between Mira Mesa Boulevard and Galvin Road.

In June 1992 the City held a hearing on the increased cost and its allocation among the property owners. Abrams opposed the proposed increase by letter and at the hearing. At the hearing, Abrams's attorney because of the substantial impact on Abrams's property sought a continuance to consult an engineer to make an alternative proposal, have an opportunity to negotiate with the other parties and prepare a more detailed case. Despite no objection from MSCE, the city council denied the request for a continuance. After Abrams's attorney spoke for approximately 15 minutes, the city council, with one dissenting vote, approved the additional reimbursement cost assessed against Abrams.

In August 1992 Abrams filed a complaint for declaratory and injunctive relief against the City. In August 1996 Abrams filed a second amended complaint for declaratory and injunctive relief, violation of section 1983 of title 42 of the United States Code, damages and a verified petition for writ of administrative mandamus. All causes of action were pleaded against the City as a defendant and the request for writ of mandamus was also pleaded against MSCE as real party in interest.

The court granted the writ and remanded the matter to the city council to "demonstrate a factually sustainable proportionality between the effects of the costs assessed through the Cost Reimbursement District and the exaction in the amended costs of $1.543 million assessed 6/23/92." In granting the writ, the court applied the tests in *Dolan* v. *City of Tigard* (1994) 512 U.S. 374 (*Dolan*) and *Nollan* v. *California Coastal Comm'n* (1987) 483 U.S. 374 (*Nollan*)

and used a heightened standard of scrutiny because the local government imposed a special discretionary permit condition on development by an individual property owner, rather than an assessment on a broad class of property owners. In applying the substantial evidence test, the court found "no relevant evidence in the record of benefits to the parcel that a reasonable mind might accept as adequate to support the conclusion that there was roughly proportional benefit to the parcel." MSCE appeals the grant of writ of mandamus.

II

DISCUSSION

A

Standard of Review

On judicial review of an administrative decision not involving or affecting a fundamental vested right, the trial court reviews the administrative record to determine whether the findings are supported by substantial evidence and whether the agency committed any errors of law. (*301 Ocean Ave. Corp.* v. *Santa Monica Rent Control Bd.* (1991) 228 Cal.App.3d 1548, 1556.) On appeal, the reviewing court also applies the substantial evidence test. (*Ibid.*)

However, if an administrative decision substantially affects a fundamental vested right, the independent judgment standard of review applies (*301 Ocean Ave. Corp.* v. *Santa Monica Rent Control Bd.*, *supra*, 228 Cal.App.3d at p. 1555); the trial court examines the administrative record for errors of law and exercises its independent judgment on the evidence. (*Ibid.*) On appeal,

the reviewing court can overturn the trial court's factual findings only if the evidence received by the trial court, including the administrative record, is insufficient as a matter of law to sustain the finding. (*Ibid.*)

Whether an administrative decision substantially affects a fundamental vested right is decided on a case-by-case basis (*301 Ocean Ave. Corp.* v. *Santa Monica Rent Control Bd.*, *supra*, 228 Cal.App.3d at p. 1556.) In deciding whether the right is fundamental and vested, the court must decide whether the affected right is "of sufficient significance to preclude its extinction or abridgment by a body lacking *judicial* power. [Citation.]" (*Frink* v. *Prod* (1982) 31 Cal.3d 166, 176, original italics.) Courts are less likely to find a vested fundamental right if the interest to be preserved is strictly economic. (*Goat Hill Tavern* v. *City of Costa Mesa* (1992) 6 Cal.App.4th 1519, 1526.)

The right to control the use of one's own property is one of the most fundamental rights in this country. (See *Dolan*, *supra*, 512 U.S. at p. 393 [the "right to exclude others is 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.' [Citation.]"].) However, the cost reimbursement lien imposed on Abrams's property does not limit his ability to use the property, but rather impacts his economic interests. Thus, the trial court properly applied the substantial evidence standard for review of the administrative record, as do we on appeal.

B

Rough Proportionality

MSCE argues that the trial court should not have applied the tests in *Dolan*, *supra*, 512 U.S. 374 and

Nollan, supra, 483 U.S. 825 and instead should have applied the test articulated in *White* v. *County of San Diego* (1980) 26 Cal.3d 897.

In *Nollan* and *Dolan* the United States Supreme Court addressed the issue of conditioning development permits on concessions by the property owner. In *Nollan*, residential property owners challenged a California Coastal Commission requirement that they grant an easement for public access across their beachfront property as a condition to approval of a building permit to construct a larger house. (*Nollan, supra,* 483 U.S. at p. 827.) The issue was whether the easement exaction furthered a legitimate state interest in public access to the beach. (*Id.* at pp. 836-837.) The Supreme Court assumed that the Coastal Commission's purposes were legitimate state interests but held there must be an essential nexus between the exaction and the asserted legitimate state interest. (*Id.* at p. 837-838.)

In *Dolan*, the court resolved "the required degree of connection between the exactions imposed by the city and the projected impacts of the proposed development." (*Dolan, supra,* 512 U.S. at p. 377.) The court reiterated that an essential nexus must exist between the legitimate state interest and the permit condition and further held that the exactions demanded by the city must be roughly proportional to the impact of the proposed development. (*Id.* at pp. 386-391.)

Both *Dolan* and *Nollan* addressed situations in which the property owner was required to provide an easement or otherwise grant public access over its property in exchange for a development permit. In neither case was the property owner required to pay a fee in exchange for a

permit to develop the property. In 1996 the California Supreme Court addressed whether *Dolan* and *Nollan* apply to the exaction of a fee as a condition to issuing the development permit. (*Ehrlich* v. *City of Culver City* (1996) 12 Cal.4th 854, 859 (*Ehrlich*).) The court concluded that *Dolan/Nollan* applies to monetary exactions imposed as a condition to approving a land development request. (*Ibid.*) To charge a monetary sum in exchange for allowing development, the municipality or other government agency must prove that "both an 'essential nexus' or relationship between the permit condition and the public impact of the proposed development, and [] a 'rough proportionality' between the magnitude of the fiscal exaction and the effects of the proposed development" exist. (*Id.* at p. 860.)

Although *Ehrlich* was decided under the Mitigation Fee Act, Government Code section 66000 et seq., its reasoning applies here. If land development is conditioned on an act that exacts property or money, the exaction must have a rough proportionality to the benefit to the property.

White does not change this analysis. In *White*, the court determined whether special assessments on property sufficiently benefited the property to justify the assessment. The court stated that an assessment must be generally proportional to benefits. (*White* v. *County of San Diego*, *supra*, 26 Cal.3d at p. 905.) Although *White* was decided several years before *Nollan* and *Dolan*, it states an assessment against property must be generally proportional to the benefits to the property resulting from the assessment, which is [sic] accord with *Nollan/Dolan/Ehrlich*. (*White*, *supra*, 26 Cal.3d at p. 905.)

C

Substantial Evidence

In applying the substantial evidence test, the trial court found "no relevant evidence in the record of benefits to the parcel that a reasonable mind might accept as adequate to support the conclusion that there was roughly proportional benefit to the parcel." Substantial evidence supports the trial court's determination.

There is no evidence in the record that the city council considered proportionality when increasing the reimbursement fee against Abrams's property. Abrams's attorney spoke for 15 minutes after his request for continuance was denied. The record shows no determination by the city council that the additional assessment was roughly proportional to benefits purportedly received by Abrams, and the city council did not identify any proposed benefit. To impose a cost reimbursement lien on Abrams's property, the City must prove that an essential nexus exists between the assessment and the benefit of public improvement and that the amount of the assessment is roughly proportional to the benefit to the property of the street improvement. Because there is no evidence of proportionality, the trial court correctly determined that insubstantial evidence supported the action by the city council.

D

Waiver

MSCE also contends that Abrams waived the right to contest the additional amount of the cost reimbursement

lien by not earlier challenging the "formula" used to calculate it.

Government Code section 66499.37 provides the statute of limitations by which time a decision of an administrative agency concerning a subdivision must be taken. Unless challenged within 90 days following the date of the decision, "all persons are barred from any such action or proceeding or any defense of invalidity or unreasonableness of such decision or of such proceedings, acts or determinations." (Gov. Code, § 66499.37.) MSCE claims this section bars Abrams's action.

Government Code section 66499.37 does not bar the action. Abrams did not object to the amount of the original lien or the first increase of that lien. Thus, there was no reason before the last increase for Abrams to challenge the formula establishing the amount of the lien. Abrams was not required to challenge a lien amount to which he did not object. Abrams did timely challenge the amount of the lien he does contest. Finally, it appears that Abrams was charged in the latest increase for 75 percent to 100 percent of certain public improvements that were not even contemplated by the earlier lien amount determination.

E

Due Process

MSCE also argues that Abrams waived any right to argue that his due process rights were violated by the city council's refusal to grant a hearing continuance. Because Abrams obtained a writ of mandamus, the due process argument is moot and we do not address it.

F

Prejudice

Abrams argues MSCE has not shown it was prejudiced or aggrieved by the grant of writ of mandamus and therefore does not have standing to appeal. MSCE is a party of record and is aggrieved. MSCE was to absorb the public improvement costs not paid by other property owners. If Abrams's share of the costs is reduced, MSCE's share increases. Therefore, MSCE is aggrieved and has standing to appeal.

III

DISPOSITION

The judgment is affirmed. Respondents are entitled to costs on appeal.

/s/ McDonald
McDONALD, J.

WE CONCUR:

/s/ Work
WORK, Acting P.J.

/s/ Haller
HALLER, J.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

CLEM ABRAMS AND JOHN BOHANNON, Plaintiffs and Petitioners, vs. THE CITY OF SAN DIEGO, a governmental agency; and DOES 1-50, inclusive, Defendants and Respondents.	Case No. 655468 ORDER DENYING PETITIONERS' SUPPLEMENTAL PETITION FOR WRIT OF ADMINISTRATIVE MANDAMUS
MESA SHOPPING CENTER EAST, a business entity; and DOES 51-100, inclusive, Real Parties in Interest.	Dept: Presiding I/C: Hon. Wayne Peterson

(Filed Mar. 30, 2001)

This matter came regularly for hearing on January 9, 2001 in the Presiding Department, the Honorable Wayne Peterson, Judge Presiding. Louis Goebel, appeared on behalf of Petitioners. Casey Gwinn, City Attorney, by John P. Mullen, Deputy City Attorney appeared on behalf of the Respondent City of San Diego. Asaro, Keagy, Freeland, and McKinley, by Steve McKinley appeared on behalf of Real Parties In Interest Mesa Shopping Center East [MSCE]. No party requested a statement of decision.

Having considered the administrative record, the briefs submitted by the parties, and the arguments of counsel, good cause appearing,

IT IS HEREBY ORDERED THAT Petitioner's supplemental petition for writ of mandate is denied.

The Court of Appeal's opinion does not require a calculation of the traffic that petitioners' parcel might someday generate. The better way to identify benefit is to determine what a willing buyer would pay for the property before the immediately after the improvements were constructed, as the City has done. Using this standard of proportionality, the record establishes a substantial evidence of proportionality. (See City's points and authorities, 18:15-19.7.) Nor has a procedural due process violation been shown. (City's points and authorities 19:22-20:4.)

APPROVED AS TO FORM AND CONTENT.

_____

Louis Goebel
Attorney for Petitioners

IT IS SO ORDERED.

Dated: MAR 30 2001

/s/ Wayne L. Peterson
JUDGE OF THE
SUPERIOR COURT
WAYNE L. PETERSON

_____

Court of Appeal, Fourth Appellate District,
Division One – No. D038402
S111918

IN THE SUPREME COURT OF CALIFORNIA

En Banc

CLEM ABRAMS et al., Plaintiffs and Appellants,

v.

CITY OF SAN DIEGO, Defendant and Respondent;

MESA SHOPPING CENTER EAST,
Real Party in Interest and Respondent.

(Filed Jan. 22, 2003)

Petition for review DENIED.

Brown, J., is of the opinion the petition should be granted.

GEORGE
Chief Justice

4 Civil D038402

COURT OF APPEAL, STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION ONE

CLEM ABRAMS and JOHN BOHANNON, Plaintiff/Appellants, v. THE CITY OF SAN DIEGO, Defendant/Respondent,	No. 4 Civil D038402 (San Diego County Superior Court No. 655468)
MESA SHOPPING CENTER EAST, Real Party in Interest/ Respondent.	

APPELLANTS' OPENING BRIEF

(Filed Jan. 2, 2002)

On Appeal from an Order of the
Superior Court of California
County of San Diego
Hon. Wayne L. Peterson

Louis E. Goebel (SBN 45236)
Law Offices of Louis E. Goebel
406 Maple Street
San Diego, CA 92103
619/239-2611

Attorneys for Appellants
Clem Abrams and John Bohannon

* * *

APPELLANTS' OPENING BRIEF

INTRODUCTION

This is the third appeal in a controversy arising from a decision by Respondent City of San Diego (hereinafter "City") to condemn a significant portion of the middle of Abrams' property for roadway purposes, in furtherance of the development plans of an adjacent property owner.

Normally, constitutional law has mandated that when a person's property is taken for public use, the public entity is required to pay just compensation. Please see, *e.g. Palazzolo v. Rhode Island* (2001) 121 S.Ct. 2448, where Justice O'Connor, in her concurring opinion, noted, at 2406:

> The Fifth Amendment forbids the taking of private property for public use without just compensation. We have recognized that this constitutional guarantee is "'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Penn Central,* [*Penn Central Transp. Co. v. City of New York*, 438 U.S. 104] *supra,* at 123-124, 98 S.Ct. 2646 (quoting *Armstrong v. United States,* 364 U.S. 40, 49, 80 S.Ct. 1563, 4 L.Ed.2d 1554 (1960)).

The California Supreme Court in *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854 noted the following, at 876:

> One of the central promises of the takings clause is that truly public burdens will be publicly borne.

In the case of the City of San Diego, a new technique has been devised, where it takes a portion of your property through eminent domain for the roadway, paying for such through an assessment district, and then tells you that your property has been benefitted by such roadway, and forces you to reimburse it for the money it paid you for taking your property in the first instance. In essence, you surrender your property for no compensation.

This approach might make some sense in the context of road widening in a commercial area where improved access could be considered an enhancement and the condemned property is taken from the edge of the parcel so that only a portion of the roadway is attributed to any one property owner. Here, the road trisected Abrams' property, the road right-of-way was fully within Abrams' property, and City claimed Abrams is responsible for the entire cost of the road. City has sought all along to have Abrams' pay for a road they do not use and did not ask for. Surely this cannot pass constitutional muster.

As a result of the last appeal, the City was required to make a determination of proportionality of the benefit of the road construction on Abrams' property to such property, compared to the general benefit, as a means of determining the fairness of the exaction the City sought to get from Abrams.

From Abrams' point of view, the logical benchmark for proportionality is the relative number of vehicle trips generated by the land uses of the respective properties and described in the General Plan. When the matter went back to the City Council after the last appeal, instead of following this approach, the City adopted the position of Real Party, which was that "consultants" could "estimate" the

difference in fair market value before and after the project and determine proportionality by comparing that difference to the exaction.

The trial court has affirmed this purported fair market value approach, giving rise to this appeal.

STATEMENT OF THE CASE

This is a case where Respondent CITY OF SAN DIEGO ("City") cooperated with Real Party in Interest MESA SHOPPING CENTER EAST ("MSCE") in the formation of a cost reimbursement district for the purpose of enabling MSCE to fund the road and drainage infrastructure necessary to serve its pending project with the understanding that it would thereby obtain reasonable reimbursement for improvements benefitting others, such as Abrams, when and if their property ever developed. [App.-3, 4][1] Two assessments resulting in liens against Abrams' undeveloped property were made under this district, totaling over $950,000.00, [App.-3, 5] such that if Abrams sought to pull a building permit for work valued over $20,000.00, such lien would have to be paid. Abrams did not challenge those assessments. [App.-3, 5]

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[1] Abrams specifically request the Court to consider the original Reporter's Transcripts and Appellant's Appendices from the previous two Appeals, D019566 (Appeal 1) and D029343 (Appeal 2) pursuant to California Rules of Court rule 11(b). This would be considered "Appeal 3". Hereinafter, all references to the Reporter's Transcript will appear as "RT-Appeal number, page number". References to the Appellants' Appendix in lieu of Clerk's Transcript shall appear as "App.-Appeal number, page number".

This case arose because City determined to condemn a right of way for a major street right through the middle of Abrams' undeveloped property, [App.-3, 5] paid a condemnation award, [App.-3, 6] and then sought to charge the full amount of the condemnation award and expenses back in as a recorded lien against Abrams' property.[2] [App.-3, 6]

This was done on the apparent theory that if Abrams had desired to develop their property before MSCE, they would have been required to dedicate (without compensation) the same property for roadway purposes. In sum, City handed Abrams $440,000.00 over their original estimate for the right of way, and then took over $546,000.00 back through the Addendum to the Assessment, by increasing the lien on their property.

Naturally, Abrams objected, and filed this action. [App.-3, 7]

After an appeal on procedural issues having to do with the Statute of Limitations, in case number D019566, this matter was remanded to the trial court by the Court of Appeal with directions to address the administrative mandamus petition on the merits.

On June 30, 1997, the trial court entered a judgment which found, among other things,

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[2] The details are somewhat complicated because as part of the road project, some drainage improvements to the remainder of Abrams' property were completed. At the end of the day, the monies Abrams received from the City for street right of way had been recouped by the City by a commensurate lien against Abrams' remaining property. See page ___, *infra*.

> 1. There is no relevant evidence in the record of benefits to the parcel that a reasonable mind might accept as adequate to support the conclusion that there was rough proportionate benefit to the parcel; . . . [App.-3, 2]

The trial court then ordered, adjudged and decreed:

> That a peremptory writ of mandate shall issue under the seal of this court commanding respondent, the City of San Diego, including all its agencies, departments, subdivisions, officers, employees, and agents, within the time specified for a return to the writ to demonstrate a factually sustainable proportionality between the effects of the increased costs of $545,251.18 assessed through the Cost Reimbursement District on June 23, 1992, and the exaction. [App.-3 3, 2]

MSCE appealed, and in case number D029343, the Fourth District Court of Appeal, Division One, affirmed, holding, among other things,

> To impose a cost reimbursement lien on Abrams's property, the City must prove that an essential nexus exists between the assessment and the benefit of public improvement and that the amount of the assessment is roughly proportional to the benefit to the property of the street improvement. Because there is no evidence of proportionality, the trial court correctly determined that insubstantial evidence supported the action by the city council. [App.-3, 13]

On June 19, 2000, City held its regular meeting, which included, as item 205, "Addendum to the Mesa Shopping Center East Cost Reimbursement District Agreement" with a City Manager's recommendation to

adopt a resolution "[r]e-affirming that a factually sustainable proportionality exists between the June 23, 1992 amendment to the Mesa Shopping Center East Cost Reimbursement District and the benefit to the Abrams/ Bohannon property." [App.-3, 422]

Abrams were allowed a **mere two minutes** on the record, the transcript of which only takes up two pages, [App.-3, 425-427] and City adopted the resolution, [App.-3, 597] based on a report from a "public finance consultant," which included a purported engineering analysis and an appraisal of the land. [App.-3, 464-596]

Abrams' then timely filed a Supplemental Petition, [App.-3, 18] which was denied. [App.-3, 676, 677-78]

This Appeal timely followed. [App.-3, 680]

STATEMENT OF APPEALABILITY

The "ORDER DENYING PETITIONERS' SUPPLEMENTAL PETITION FOR WRIT OF ADMINISTRATIVE MANDAMUS" entered March 30, 2001 is a final judgment of the Superior Court specifically made appealable by Code Civ. Proc., § 904.1(a)(1).

STATEMENT OF FACTS

This is a case where Abrams, owners of nine acre parcel of property in the Mira Mesa area of the City of San Diego, had the misfortune to be located directly adjacent to a 23.8 acre parcel owned by MSCE.

Abrams had no present intention of developing their property. MSCE, on the other hand, had immediate intentions to subdivide and develop its property, and in

furtherance of that goal sought to obtain approval of a subdivision map.

Part of the subdivision map review process involved an analysis of the on site and off site physical improvements required for the project. In this case, City officials determined that Mira Mesa Boulevard needed to be widened, Galvin Avenue needed to be widened, and a new street, ultimately called Westview Parkway, needed to be constructed.

MSCE obtained approval of its tentative subdivision map with a number of conditions which included the improvements to Mira Mesa Boulevard and Galvin Avenue, and the construction of Westview Parkway.

When the project was proposed, there were two potential alignments for Westview Parkway and Galvin Avenue. One followed the property line between Abrams' and MSCE's respective properties, and the alternate would be largely on Abrams' property, consuming approximately two of the nine acres, and cutting Abrams' property up into three pieces, one of which would abut MSCE's property, and another of which would be virtually useless because of its small size. [App.-2, 128]

The record contains no evidence as to why the alternative alignment was selected, but as this matter has evolved, a significant reason has become apparent.

The City of San Diego has developed a pattern of circumventing the eminent domain process for the acquisition of private real property for public use in exchange for just compensation, as contemplated in Title 7 of the California Code of Civil Procedure, sections 1230.010, *et seq.*, by either requiring dedications, or, if the person or

entity from whom the property is to be taken is not a current applicant for permission to develop, by proclaiming that the property is "benefitted" by the development such that an assessment lien can be placed upon it.

In this case, the vehicle for the creation of the aforementioned assessment lien was a "cost reimbursement district," pursuant to which the City of San Diego required that the developer, MSCE, "front" the cost of the improvements, including Westview Parkway and Galvin Avenue, with the understanding that Abrams and other property owners in the area would be required to "reimburse" MSCE for a portion of those costs. These reimbursements, hereinafter referred to as "exactions" would be in the form of liens on the properties, payable if any development application over $20,000.00 were submitted at any time within the next twenty years.

An additional aspect of the policies of the City of San Diego is that somewhere along the line a custom evolved, which was that it could be assumed, without further analysis, that any property that suffered a condemnation of any portion thereof for road improvements was "benefitted" by the portion of the road improvements located on that property. One could reasonably speculate this "assumption" arose from, among other things, the case of *White v. County of San Diego* (1980) 26 Cal.3d 897,[3] wherein the Supreme Court upheld an assessment against

[3] As this Brief will demonstrate, the validity of City's interpretation of the *White* case should, by now, be in serious doubt, given the holdings in *Dolan v. City of Tigard* (1994) 512 U.S. 374, *Nollan v. California Coastal Commission* (1987) 483 U.S. 825, and *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854.

property owners on either side of Mission Gorge Road for improvements to the road consisting of widening and the installation of medians and signals. In that case, the Supreme Court specifically approved of an approach which surcharged those properties whose frontages were taken by condemnation but did not charge those properties whose owners dedicated their frontage strips.

Unfortunately, somehow officials of the City of San Diego and the land use development consultants who work with them allowed the holding in *White* to be translated into a "rule of thumb," hereinafter referred to as the "unfounded allocation presumption," that if real property was condemned for road purposes leaving a remainder parcel, the remainder parcel was "benefitted" to the extent of the cost of the condemnation, and the proportion of the cost allocable to the remainder parcel was that represented by the portion taken compared to the portion taken from the adjoining property.

Put another way, if the center of the new road goes down the property line between two properties, they share the cost equally, but if the road is fully on the property of one property owner, going down the edge adjacent to the other property, the property owner upon whose property the road is built bears the entire cost of site acquisition and development. This approach is not only illegal generally, but, as will be shown herein, is in direct violation of the City Council's own policy 200-1 [App.-2, 1], discussed in more detail, *infra*.

Earlier MSCE took the position that the aforementioned "unfounded allocation presumption" results in the "proportionality" required by the Fifth Amendment of the United States Constitution as described in *Dolan v. City of*

Tigard (1994) 512 U.S. 374, *Nollan v. California Coastal Commission* (1987) 483 U.S. 825, and *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854, such that no further demonstration of proportionality need be made.

In this case, that meant that if MSCE was shrewd enough to cause the alignment of Westview Parkway and Galvin Avenue to veer entirely onto Abrams' property, MSCE could avoid having to pay for Westview Parkway and Galvin Avenue and save the other property owners in the cost reimbursement district from sharing in this expense. The City of San Diego cooperated fully with MSCE's plan, in violation of its own policy, number 200-1. [App.-2, 1]

In connection with MSCE's development, the MESA SHOPPING CENTER EAST COST REIMBURSEMENT DISTRICT NO. 4045 ("the DISTRICT") was purportedly formed and implemented in 1990 pursuant to San Diego Municipal Code §62.0208. [App.-3, 382, 406] This process generally permits the first developer of property to fund the construction of public improvements benefitting not only that property, but other adjoining property and to secure a claim for proportionate reimbursement from other benefitted owners, if and when they develop.

Much earlier (under different circumstances) something called the "EIGHT OWNERS AGREEMENT" for sharing the costs of public improvements in eastern Mira Mesa among eight private landowners (including Abrams), was approved by the City Engineer on May 15, 1985. (Only a portion of this document is in the Administrative record [App.-3, 475-80]) This agreement allocated one-quarter of the offsite improvement costs to Abrams, [App.-3, 478, item 9] **but contemplated a situation where Westview**

Parkway went along the side of Abrams' property. At the time of formation of the DISTRICT, the estimate of Abrams' share was $570,948.00. [App.-3, 442] Although Abrams objected to the formation of the DISTRICT, they did not object to this assessment.

Once the project was underway, MSCE and City decided that Westview Parkway and Galvin Avenue should be entirely within the confines of Abrams' property, resulting in a division of the property into two small parcels and one larger parcel. In July of 1990, MSCE requested that additional costs be charged to Abrams' property, increasing their total cost to $998,299.00. [App.-3, 382] Abrams also did not object to this first amendment, which included a budget for $200,750.00 for acquisition of right-of-way across Abrams' property, and a budget for the installation of a major storm drain across Abrams' property.

The effect of this was that the cost reimbursement district was formed, and "exactions," in the form of liens placed on Abrams' property were made, first in the amount of $570,948.00 and then increased to the total amount of $998,299.00. Abrams tolerated these first two exactions.

Abrams had not been seeking to develop their property, so City could not use its usual tactic of requiring dedication of the road right-of-way as it passed Abrams' property.[4] The only way City could obtain the right-of-way of Westview Parkway and Galvin Avenue that would

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[4] Such a dedication would not have passed constitutional muster in any event, given the ultimate alignment the CITY chose for the road, which was entirely inside the property and consumed approximately 25% of its area.

occupy 25% of Abrams' property, in a time frame suitable to MSCE, was to condemn it. This condemnation was fully litigated, resulting in an award of $641,358 to Abrams. [App.-3, 443]

In June 1992, City held a hearing on the increased cost and its allocation among the Abrams. Abrams opposed the proposed increase by letter and at the hearing. At the hearing, Abrams sought a continuance which was denied, and, after a fifteen minute presentation, the city council, with one dissenting vote, approved the third cost reimbursement assessment against Abrams. [App.-3, 443-44]

Abrams therefore sought a Writ of Mandate, for the purpose of causing City Council to conduct a full and fair hearing as to the issue of whether Abrams were being liened to an extent disproportionate to the benefit their property obtained from the improvements that are the subject of the "cost reimbursement district." [App.-3, 444]

Ultimately, the trial court disagreed with City's approach as to proportionality, ruling that it was up to City of San Diego to demonstrate a factually sustainable proportionality between the effects of the increased costs of $545,251.18 assessed through the cost reimbursement district on June 23, 1992 and the exaction with which Abrams had taken issue. [App.-3, 444]

MSCE appealed, and this Court affirmed that determination, in case number D029343. [App.-3, 452]

The effect of the Opinion in D029343 was that City Council would be required to hold a proper hearing on the question of the proportionality of the benefits related to the exaction, so as to create a record permitting judicial review of that question, if necessary.

The Opinion stated, at 11:

> To impose a cost reimbursement lien on Abrams's property, the City must prove that an essential nexus exists between the assessment and the benefit of public improvement and that the amount of the assessment is roughly proportional to the benefit to the property of the street improvement. Because there is no evidence of proportionality, the trial court correctly determined that insubstantial evidence supported the action by the city council. [App.-3, 450]

City then scheduled another hearing on the question of the third exaction, Abrams specifically took issue with the question of proportionality, requesting a continuance so that they could have experts present a more appropriate description of proportionality. [App.-3, 396, 457-59] This request was granted.

On June 19, 2000, the City Council held its regular meeting, which included, as item 205, "Addendum to the Mesa Shopping Center East Cost Reimbursement District Agreement" with a City Manager's recommendation to adopt a resolution "[r]e-affirming that a factually sustainable proportionality exists between the June 23, 1992 amendment to the Mesa Shopping Center East Cost Reimbursement District and the benefit to the Abrams/Bohannon property." [App.-3, 422]

Abrams were allowed **two minutes** on the record, the transcript of which only takes up two pages, [App.-3, 425-27] and City adopted the resolution, based on a report from a "public finance consultant," (the "Fournier Report") which included a purported engineering analysis and an appraisal of the land. [App.-3, 464-596] The Fournier Report contained a purported "benefit analysis" involving

only Abrams' property, which concluded with the opinion that the value of Abrams' property had risen based on the "improvements" hence had been benefitted. [App.-3, 471-74]

City's consultant noted that this condemnation award was $440,000.00 more than the budget as of the first amendment. This consultant, Fournier, then sums up what City did:

> Accordingly, on April 20, 1992, the cost reimbursement engineer, Wildan Associates, prepared and submitted its report regarding the final cost of improvements and right-of-way acquisition, and proposed spreading the costs that had increased from that which was estimated at the time of the first amendment to the cost reimbursement district. It had by that time been determined that the cost of right-of-way acquisition, including attorney's fees and other litigation expenses, was $696,905.66, of which $641,358 was the right-of-way compensation agreed to be paid and actually paid to the owners of the Abrams/Bohannon parcel. This represented a total increase of $496,000 from the estimate for right-of-way acquisition costs which was used at the time of prior amendment to the reimbursement district. **This *entire amount*, together with approximately $49,000 of the increase in overall improvement costs experienced by the district, was then assessed to the Abrams/Bohannon parcel by an amendment to the district passed by the City Council on June 23, 1992.** [App.-3, 467-68, emphasis added.]

At the June 19, 2000 hearing, the additional lien was approved with no record whatsoever containing an actual

demonstration of any sort of calculation regarding proportionality as between the various properties benefited by the Westview Parkway and Galvin Avenue improvements. [App.-3, 424-30]

Abrams therefore filed a Supplemental Petition for Writ of Mandate, [App.-3, 18] seeking to have the trial court tell City that it had used the wrong standard. The trial court denied the Supplemental Petition, holding:

> The Court of Appeal's Opinion does not require a calculation of the traffic that petitioners' parcel might someday generate. The better way to identify benefit is to determine what a willing buyer would pay for the property before and immediately after the improvements were constructed, as the City has done. Using this standard of proportionality, the record establishes a substantial evidence of proportionality. (See City's points and authorities, 18:15-19:7.) Nor has a procedural due process violation been shown. (City's points and authorities 19:22-20:4.) [App.-3, 676, 677-78]

This Appeal timely followed. [App.-3, 680]

I. REGARDLESS OF THE STANDARD OF REVIEW, REVERSAL IS APPROPRIATE BECAUSE THERE WAS AND IS **NO EVIDENCE** THAT RESPONDENT CITY ENGAGED IN AN ACTUAL ANALYSIS OF PROPORTIONALITY.

A. *The substantial evidence standard of review was stated as law of the case, but "heightened scrutiny" is required.*

The Court of Appeal Opinion in case number D029343 describes the applicable standard of review this way:

> The right to control the use of one's own property is one of the most fundamental rights in this country. (See *Dolan* [*Dolan v. City of Tigard*], *supra*, 512 W.S. at p. 393 [the "right to exclude others is 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.' [Citation.]"].) However, the cost reimbursement lien does not limit his ability to use the property, but rather impacts his economic interests. Thus, the trial court properly applied the substantial evidence standard for review of the administrative record, as do we on appeal. [App.-3, 379-80]

Although the Court of Appeal Opinion in D029343 mentions *Ehrlich v. City of Culver City*, *supra*, 12 Cal.4th 854, it does not refer to this bit of analysis in the case, at 876:

> Nonetheless, we reject the proposition that *Nollan* and *Dolan* are entirely without application to monetary exactions. When such exactions are imposed – as in this case – neither generally nor ministerially, but on an individual and discretionary basis, we conclude that the **heightened standard of judicial scrutiny** of *Nollan* and *Dolan* is triggered. (Emphasis added.)

In sum, the true standard of review is heightened scrutiny, particularly where, as here, the exaction occurred **entirely in the absence of any development project application on the part of Abrams.**

B. *City had no evidence whatsoever of proportionality and did no actual analysis of proportionality in confirming the third exaction.*

Here, there was no evidence whatsoever regarding proportionality of benefit between the properties affected by the Cost Reimbursement District, Abrams' property, and the general public, except that offered by Guy Winton with respect to vehicle trips across Westview Parkway and Galvin Avenue [App.-3, 456] which the trial court declined to consider:

> The Court of Appeal's decision does not require a calculation of the traffic that petitioners' parcel might some day generate. [App.-3, 676]

The gist of the consultant's report as adopted by the City Council and accepted by the trial court was that since it appeared that the fair market value of Abrams' property had increased in value after the improvements by an amount in excess of the allocated cost represented by the three exactions, proportionality had been achieved.

The trial court bought this view, without explaining how one can determine proportionality without a comparison.

The record is devoid of any evidence that the City Council considered the proportionate benefit to Abrams' property against that of the adjacent properties and the general public in approving the exactions. The trial court was, erroneously, unconcerned with this omission, apparently believing that a comparison of opinions of value of

Abrams' property "before and after" alone by one appraiser was sufficient. [App. -3, 503-86] It should not be.[5]

> C. *The only relevant evidence in the record, which the City Council and trial court apparently did not consider, relative vehicle trips, did not support any increase in the exaction.*

Fournier, the consultant hired by City to support its position, offered conclusions in its report to City, none of which described a formula for "rough proportionality," but which, distilled to their essence, say:

- Abrams would have had to dedicate in fee 25% of their property for right-of-way if they had decided to develop first, without acquisition cost to City[6];
- If it is rezoned to the highest possible zoning, the value of Abrams' property has been enhanced at a lesser total cost than if Abrams had sought to develop first;
- The appraisal indicates that the value of Abrams property has increased because of the improvements; and
- "The increase in the assessment to the Abrams/Bohannon parcel to reflect the **increase in the cost of right-of-way acquisition was directly related to the expected impact of development of the Abrams/Bohannon parcel**, and the benefits that parcel received as reflected by the parcel's resulting

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[5] As an aside, it should be noted that this "enhancement in value" is ephemeral in any event, because the exactions would exist as a lien, which would come right off the top of any actual sale transaction for Abrams' property.

[6] This result was premised on an arbitrary CITY rule which predated the *Nollan-Dolan* doctrine, discussed in detail *infra*.

> increased market value which exceeds the total assessment." [App.-3, 464-74][7]

Abrams submits that this approach to "proportionality" is neither logical, nor consistent with the Court of Appeal Opinion in D029343, which states, at 11:

> To impose a cost reimbursement lien on Abrams's property, the City must prove that an essential nexus exists between the assessment and the benefit of public improvement and that the amount of the assessment is roughly proportional to the benefit to the property of the street improvement. [App.-3, 450]

It should be borne in mind that these "assessments" were not the product of any effort by Abrams to develop their property, but rather were based solely on MSCE's development efforts. This is perhaps the most extreme case yet of a violation by local government of the plain mandates of *Nollan v. California Coastal Commission*, *supra*, 483 U.S. 825 and *Dolan v. City of Tigard*, *supra*, 512 U.S. 374.

Fournier's conclusionary, misguided analysis was in sharp contrast to the report submitted by Abrams' expert Guy Winton, a Registered Civil Engineer. Mr. Winton pointed out significant flaws in the Fournier report, including:

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[7] This is the approach erroneously approved by the trial court in its latest decision. Instead of comparing the relative level of use of the street between the various properties and then allocating cost based on that use, the "consultant" merely opined that the property was more valuable with the street than without it, hence "no harm, no foul."

- It ignored the relative traffic impact of Abrams' property, even if built out to City's highest estimate of 87 dwelling units, which would account for 2.8% or less of the traffic on Westview Parkway. [App.-3, 456]

- It erroneously relied on the "EIGHT OWNERS AGREEMENT," which was based on a 50-50 split of right-of-way for Westview Parkway between Abrams and MSCE resulting in a 25% share of cost to Abrams, but thereafter, **the entirety of the right-of-way was shifted to Abrams' property.** Because of this, the "EIGHT OWNERS AGREEMENT" cannot support a "rough proportionality" analysis at all. [App.-3, 457]

- It failed to note that the San Diego Unified School District now owns one of the small parcels, which is a further modification of the "EIGHT OWNERS AGREEMENT." [App.-3, 458]

- It failed to recognize that the second amendment **devalued** Abrams' property, rather than increasing its value. [App.-3, 460]

The bottom line is that there was no demonstration of a "rough proportionality" between the third assessment contained in the second amendment and the public impact of development of Abrams' property, but rather the bald (and erroneous) assumption that Abrams' property was enhanced in value in excess of the assessment, hence the lien was proper. That is not "proportionality" in any sense, **particularly where Abrams did not ask for the improvements and had not sought to develop their property**. Assuming, without conceding, that enhancement in value was an appropriate benchmark, unless the enhancement in value to all other properties served by Westview Parkway was also calculated, and they were all compared, there is no hint of "proportionality."

When one compares the 696 Average Daily Trips[8] that would be attributable to the 87 maximum residential units on Abrams' property, [App.-3, 456] with the 25,000 Average Daily Trip cap, and the 8,000 existing Average Daily Trips as of April, 1998, [App.-3, 456] the idea that 696 trips, which are, per the record, 8.7% of current, and 2.8% of projected trips should account for 100% of the right-of-way cost is absurd.

To put it another way, under the Court of Appeal opinion in case number D029343, which is now law of the case, it was up to City to divide (or "proportion") the exaction represented by the second amendment (the third exaction) between Abrams and other owners (and users) based on the relative impact of their respective development potentials on the use of the improvements. The record reflects no such comparison at all. If there had been such a comparison, there would have been no additional increment attributable to Abrams' property, as the first amendment had already allowed over $200,000.00 for right-of-way, and 2.8 to 8.7% of the $696,905.00 total cost would have been $19,513.34 to $60,630.74.[9]

An example of how "summary" this "evidence" is may be found at App.-2, 302, the 1992 "Project Description" where the allocation of Westview Parkway costs is described:

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[8] Average Daily Trips per Dwelling Unit times the number of expected dwelling units (or other users) is the fundamental yardstick for design of circulation systems in City.

[9] Even the Rick Engineering Estimate mentions 7.9% of Westview Parkway and 1.6% of Galvin Avenue as the shares attributable to Abrams' property. [App.-3, 482-501]

> Westview Parkway is a north-south four lane major street connecting Mira Mesa Boulevard with developments to the north. The portion of Westview Parkway connecting Mira Mesa Boulevard with Galvin Avenue was constructed by Mesa Shopping Center East. [Appellant herein] The cost for the construction of Westview Parkway as outlined in the "Eight Owners" agreement is to be shared in a proportion of 75 percent to Mesa Shopping Center East and 25 percent by the adjacent property commonly referred to as the "Abrams" site.
>
> The cost split of 75 percent and 25 percent was based on the original alignment determined to occupy 75 percent of the Mesa Shopping Center East property and 25 percent of the Abrams site. A new alignment for this section of street was approved and constructed. **This new section of street was constructed on Abrams property alone, thus Abrams will bear the total difference in construction cost between the original and the new alignment as shown below**. (Emphasis added.)

[Thus, with less than 3% of the projected trips in the future, the consultant says it is fair for Abrams to be saddled with the entire burden – preposterous!]

What the record **does** reflect is the fact that counsel for Abrams attempted to obtain time to discuss the concept of proportionality before the City Council, and was restricted to two minutes, resulting in a two page hearing transcript.

D. *Continued use of the unfounded allocation assumption violates the City of San Diego's very own "Council Policy" and conflicts with this Court's earlier decision.*

"COUNCIL POLICY," number 200-1, referring to "Distribution of Street Improvement Costs," was effective 8-13-79.[10] [App.-2, 1]

Section 1.a. thereof states, in pertinent part:

> a. that portion of the street system which provides for local traffic movement and access to abutting property should be the responsibility of the Abrams who receive the benefit.
>
> Streets which facilitate the movement of through traffic, or serve in a collector function, are of benefit to the general area, and this community should share in the cost. . . .

Section 2 describes the general responsibility of an "abutter."

> *Abutter*. Abutting property is responsible for improvements of local streets, or for that portion of collector and arterial streets which is equivalent to the width of a local street.
>
> This responsibility is up to a 40' curb-to-curb with in a 60' right-of-way providing two 12'

[10] The Court's attention is respectfully invited to the fact that this policy predates *Dolan v. City of Tigard*, *supra*, 512 U.S. 374, *Nollan v. California Coastal Commission*, *supra*, 483 U.S. 825, and *Ehrlich v. City of Culver City*, *supra*, 12 Cal.4th 854, and cries out for review in light of these changes in the law.

> travel lanes and two 8' parking lanes in residential and commercial areas, . . . Such improvements include right-of-way, grading, drainage structures, curbs, sidewalks, paving and landscaping. . . .

The balance of the policy indicates that other expenses are to be borne by the community.

Here, it appears from the report provided to the City Council for the hearing which resulted in this action [App. 298] that the entire cost of the portion of Westview Parkway taken from Abrams, including acquisition, as well as costs related to the portions of Galvin Avenue taken from Abrams, was allocated to Abrams, with no allocation to either any other property in the cost reimbursement district, or, perhaps more importantly, the actual community benefitted by Westview Parkway and Galvin Avenue, as required by the City's own Council Policy. [App. 2] This was wrong for two reasons:

1. Both of these thoroughfares are four lane, hence even under Council Policy, the cost should have been allocated between the abutter and the community at large; and

2. In any event, application of the unfounded allocation presumption violates the policy, at 1.a., that the cost should be allocated among the Abrams who receive the benefit of the street, since it presumes that the only property owner benefiting from the street is the "abutter."

Because the minimal "evidence" in the record described violation of the City Council's own policy, the trial court was wrong when it decided that identification of benefit through theoretical enhancement in gross market value of Abrams' property (alone) before and immediately

after the enhancements justified a finding of proportionality.

It makes no sense to say that 100% is "proportional," yet that is the ultimate effect of the trial court's ruling.

II. AS A MATTER OF LAW, THE "ASSUMPTION" OF "PROPORTIONALITY" USED BY THE CITY WAS LOGICALLY INCORRECT AND IN DIRECT VIOLATION OF THE RULE DESCRIBED BY *DOLAN*, *NOLLAN*, AND *EHRLICH*.

A. *An assumption of proportionality that allocates all costs of street right-of-way acquisition and improvement to the landowner from whom the right-of-way is acquired is unconstitutional.*

As noted above, Council Policy 200-1 was effective August 13, 1979. [App.-2, 1] *White v. County of San Diego*, *supra*, 26 Cal.3d 897 was decided in 1980.

As the Court has already noted in its Opinion in the earlier appeal, number D019566, [App. 787-804] *Nollan v. California Coastal Commission*, *supra*, 483 U.S. 825, *Dolan v. City of Tigard*, *supra*, 512 U.S. 374, and *Ehrlich v. City of Culver City*, *supra*, 12 Cal.4th 854, all bear on the issues of this case.

All of these case were decided after implementation of Council Policy 200-1 [App.-2, 1] and after the State Supreme Court's decision in *White*.

Discretionary permit conditions that exact money or real property from landowners present "an inherent and heightened risk that local government will manipulate the police power to impose conditions unrelated to legitimate

land use regulatory ends. . . ." (*Ehrlich v. City of Culver City*, *supra*, 12 Cal. 4th 854, 869.) To assure that a discretionary permit exaction is related to legitimate regulatory ends, the government entity must demonstrate an "essential nexus" between the state interest and the permit condition, and a relationship of "rough proportionality" between the exaction and the public impact of the proposed land use. (*Dolan v. City of Tigard*, *supra*, 512 U.S. at p. 391; *Nollan v. California Coastal Commission*, *supra*, 483 U.S. at p. 837; *Ehrlich v. City of Culver City*, *supra*, 12 Cal. 4th at pp. 869-874.)

In *Nollan*, the United States Supreme Court invalidated a coastal development permit conditioned upon the landowners granting a public easement across their beachfront property. (*Nollan v. California Coastal Commission*, *supra*, 483 U.S. at pp. 827-842.)

The High Court found an "essential nexus" must exist between legitimate state interests and the exacted condition. (*Ibid.*) The court found no such nexus between the state interest in preserving roadside ocean views and an easement allowing the public to walk across the landowners' property. (*Id.* at pp. 836, 838-842.)

In a more recent case, the United States Supreme Court found a nexus between state interests in flood prevention and traffic alleviation and a city's development permit conditions requiring a landowner to dedicate some of her commercial property for storm drainage and a pedestrian/bicycle pathway. (*Dolan v. City of Tigard*, *supra*, 512 U.S. at pp. 387-388.) But a nexus alone is not sufficient; there must also be a "'rough proportionality'" between the exaction and the public impact resulting from the proposed development. (*Id.* at p. 391.) In *Dolan*, the city failed to demonstrate that the demanded public

floodplain easement was required for flood control, or that the demanded pathway was likely to offset traffic congestion created by the landowner's property development. (*Id.* at pp. 392-395.)

Our Supreme Court recently held that the *Nollan-Dolan* doctrine heightened standard of scrutiny applies to possessory and monetary discretionary exactions alike, and invalidated a zoning permit for construction of condominiums conditioned upon the landowner's payment of $280,000 to mitigate the loss of city land previously used for recreational facilities. (*Ehrlich v. City of Culver City, supra*, 12 Cal. 4th at pp. 859-863, 881.) The exaction failed the "rough proportionality" test because the city made no "individualized findings to support the required 'fit' between the monetary exaction and the loss of a parcel zoned for commercial recreational use." (*Id.* at p. 883.)

The argument by City and MSCE that relief from a dedication requirement is a special benefit to Abrams' parcel that is proportional to the right-of-way acquisition costs shows just the attitude that connects up the *Nollan* and *Ehrlich* cases.[11] The current state of the **law** is *not* that requiring dedications as a condition of project approval is *per se* legal. The City of San Diego has just not caught up to the development of the law in this regard. *Nollan v. California Coastal Commission, supra*, 483 U.S. 825 specifically stands for the proposition that dedications *cannot* be arbitrarily exacted as a condition of permit approval. That being the case, how can relief from a

[11] Again, noting that there was **no** proportionality because 100% of the acquisition cost of the relevant portion of Westview Parkway and Galvin Avenue was allocated to Abrams' property.

"dedication requirement" that is illegal in the first instance be a "benefit?"

Abrams submits that all of these cases have properly described the responsibility of government to Abrams to avoid exactions that are not "roughly proportional" to the public impacts resulting from their specific project.

What that means in this case is that the City of San Diego should not only stop using the unfounded allocation presumption as a means of taking people's property without compensation, which is what would have occurred in this case, but also make "some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." (*Ehrlich v. City of Culver City, supra*, 12 Cal. 4th at pp. 873.)

B. *MSCE's argument that the second additional exaction was pursuant to a previously approved formula is not accurate.*

MSCE previously took the position that there was something it calls the "Eight Owners" agreement, citing Appellant's Appendix pages 300 and 302, which is a summary which refers to the agreement but is not the agreement itself.

More important than the fact the agreement was not in the record before the trial court is the fact that even under MSCE's own description of the agreement, the ultimate allocation of Westview Parkway and Galvin Avenue is inappropriate.

MSCE asserts, at page 12 of its Opening Brief, that under the "Eight Owners" agreement, Abrams agreed to bear 25% (twenty-five percent) of the cost of Westview

Parkway. (Note: According to the record, this agreement was entered into in 1985, five years before Westview Parkway and Galvin Avenue was [sic] realigned to veer through the middle of Abrams' property rather than following its western boundary. [App. 300]) Abrams then assert that simply because ultimately 75% of Westview Parkway was built on Abrams' property that the 25% commitment should be changed into a 75% commitment. This assertion is made with absolutely no reference to any evidence in the record that Abrams agreed to it.

It appears that the preparers of the April 1992 report [App. 298] made the same leap. There is simply no evidence to support this assumption, which is neither logical nor fair.

In fact, if one reads the documentation supporting the first exaction, one sees a description of numbers that fit approximately 25% of the final cost of the right-of-way being attributed to Abrams' property. There is simply no basis in fact, much less in the record, for any assumption that Abrams agreed to allow the City a "blank check" with regard to Westview Parkway and Galvin Avenue.

C. *MSCE's Special Assessment Lien analogy is inaccurate.*

MSCE argues that the cost reimbursement lien is similar to a special assessment lien. Although the mechanics may be similar, this analogy is inappropriate, specifically because a normal special assessment lien is the product of the creation of a district where some attention is paid to proportionality as between the amount of the assessment and the benefit of the project on the parcel assessed.

Special assessments are charges imposed on owners of particular parcels of real property to provide specific, direct and special benefits to the properties proportional to the benefits derived, beyond those enjoyed by the general public. (*Knox v. City of Orland* (1992) 4 Cal. 4th 132, 141-142; *San Marcos Water Dist. v. San Marcos Unified School Dist.* (1986) 42 Cal. 3d 154, 161-162.) They "identify the benefit which the public improvement will render; . . . determine if the Abrams will receive a benefit different from that of the general public; and . . . ascertain if the formula on which the assessments are made is based on the benefit received." (*Harrison v. Board of Supervisors* (1975) 44 Cal. App. 3d 852, 857.)

Please see also *Furey v. City of Sacramento* (1979) 24 Cal.3d 862, 874:

> We made it clear in the *Agins* [*Agins v. City of Tiburon* (1979) 24 Cal. 3d 266] case, however, that a land-use regulation may not be applied to one otherwise subject to it if to do so would result in a taking of property without just compensation. And as the United States Supreme Court said in *Norwood v. Baker* (1898) 172 U.S. 269 at page 279 [43 L. Ed. 443 at p. 447, 19 S. Ct. 187], **"the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking under the guise of taxation of private property for public use without compensation.**" (See also *Spring Street Co. v. City of Los Angeles* (1915) 170 Cal. 24, 30 [148 P. 217]; *Harrison v. Board of Supervisors* (1975) 44 Cal. App. 3d 852 [118 Cal. Rptr. 828].) (Emphasis added.)

In this case, the trial court earlier wisely recognized that the approach of condemning real property for street right-of-way and then assessing back the costs of such right-of-way to the very property owner from whom the land is taken is wrong, without some assessment of proportionality. Later, somehow, the trial court's wisdom dissipated.

The record remains totally devoid of any indication of any meaningful review and determination of proportionality as to Westview Parkway and Galvin Avenue, as between Abrams' property, the properties of MSCE and others nearby, and the general public. Without such review, the goal of proportionality could never be realized, and apparently will not be realized in this case, absent reversal.

III. ABRAMS WAS SORELY PREJUDICED BY THE TRIAL COURT'S REFUSAL TO FORCE CITY TO MAKE A TRUE CALCULATION OF PROPORTIONALITY.

The 2000 public hearing on this matter, [App.-3, 424-430] illustrates, just as the previous one did, many of the weaknesses of determination of detailed matters before a busy, pre-occupied City Council – and worse.

The record reflects arbitrary time limits which insured lack of understanding. In response to Abrams' request for more time, the Presiding Officer curtly denied the request. [App.-3, 425 (" . . . Noted, but your two minutes have started.")]

Two minutes for Abrams after eight years and two appeals!

References to the previous council decision which resulted in the Writ of Mandate upheld by the Court of Appeal went unheeded.

In 1992, Councilwoman Wolfsheimer captured the essence of the political issue with her last comment preceding the prior vote:

> Wolfsheimer: "I still want to know why Pardee doesn't pay for the road they built. Oh, well." [App.-2, 411]

While it didn't affect his vote, Councilman Roberts, perhaps inadvertently, put the true essence of this matter on the record (and supplies the context to Councilwoman Wolfsheimer's Pardee remark):

Roberts:	"The road that was put in was required under the join –, under the community plan, irrespective of what the nature of the developments were on either side of it. Is that correct?
Male Voice:	I have to assume that, sir.
(Staff)	My recollection and from way back was that indeed was the fact, and it's serving that whole area up in back with the direct access off of Mira Mesa [Boulevard] as opposed to using Black Mountain Road. Isn't that. . . . ?
Male:	Correct.
Roberts:	Yeah, I mean, that's what's setting the width of that is, is it's not just going in for these two developments, it's serving a whole area,

> but in fact it's the developments that adjoin in that road that bear the burden of the cost. [App.-2, 409-410]

Thus, we have as near as one could hope to get in a public hearing *an admission*, by an earlier council that there is no relationship between the demand created – in this case by some future, yet unformalized, private development, on what is now three irregular parcels on the remaining 7 acres and the immediate public improvement of a four lane major street with extensive landscaping. In connection with Councilwoman Wolfsheimer's Pardee remark, it doesn't take a rocket scientist nor a highly paid political consultant to conclude that Pardee is expected to be one of the major residential developers of "that whole area up in back" as Councilman Roberts calls it.

This is borne out by the aforementioned Average Daily Trip analysis, which puts Abrams at 696 Average Daily Trips out of the estimated 8,000 to 25,000 total Average Daily Trips.

By the time of the 2000 City Council meeting, all of the construction was *fait accompli*, and there were new council members who lacked the history, so the process was even smoother for MSCE. A review of the record reflects **no discussion or analysis of "rough proportionality" by the City Council whatsoever.**

The City Council again merely "rubber stamped" MSCE's effort to seek the additional $696,905.66 for right-of-way acquisition [App.-3, 467-68] plus various other charges for a grand total of $1,543,550.18 – all at a time when Abrams had no development application pending or even contemplated.

Despite the trial court's prior ruling, as affirmed by the Court of Appeal, that "proportionality" should be evaluated, the trial court in this instance merely accepted the seemingly plausible, yet erroneous assumption that "proportionality" could be determined without any comparison.

The upshot is that Abrams unfairly got saddled with paying for public improvements to meet the demands created by "that whole area up in back" and by MSCE's shopping center expansion. That is what the United States Supreme Court has said twice in the recent era is unconstitutional, what the Court of Appeal previously congratulated the trial court for recognizing in case number D029343, but which the trial court ultimately somehow forgot.

The effect of all of this is to put Abrams into a position where the dollars Abrams originally received for the taking of his property will go entirely back to the City. It is the same as if the City had just taken his property without compensation in the first instance.

CONCLUSION

The effect of the Judgment in this case is to enable City to steal over two acres of Abrams' property for the benefit of MSCE and others, without paying for it.

As soon as City abandoned all effort to compare the relative benefit of Westview Parkway and Galvin Avenue to Abrams' property with that of all others with access to same, it violated Abrams' constitutional rights to be free from a taking of their property without compensation.

This Court previously recognized that a failure to make a fair determination of proportionality violated the law.

The trial court's decision to accept a purported analysis of "proportionality" that did not require a comparison of relative benefit, compounded City's violation of Abrams' constitutional rights under the *Nollan-Dolan* doctrine.

That Judgment was in error, since there is no evidence in the record of any analysis of proportionality except the continued use of the "unfounded allocation presumption" and a subsequent assumption of enhancement of the gross value of Abrams' property, both of which are, themselves, contrary to law.

In any event, the over-arching mandates of the *Nollan-Dolan* doctrine from the United States Supreme Court, embraced by the California Supreme Court in *Ehrlich*, *supra*, forbid the practices employed by City.

A decade of litigation over this point is long enough. City has had three turns at bat, and on each occasion has missed as wildly as a batter trying to hit a Trevor Hoffman change-up for the first time. Remand will do no good, and at this stage is punitive to Abrams.

The Judgment should be reversed, with instructions to the trial court to enter Judgment striking the assessment in question.

Dated: January 2, 2002

Respectfully submitted,

LAW OFFICES OF LOUIS E. GOEBEL

By: /s/ Louis E. Goebel
Louis E. Goebel
Attorney for Appellants
Clem Abrams and John Bohannon

* * *

APPENDIX G

4 Civil D038402

COURT OF APPEAL, STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION ONE

CLEM ABRAMS, *et al.*, Petitioners and Appellants, v. CITY OF SAN DIEGO, Respondent.	No. 4 Civil D038402 (San Diego County Superior Court Case No. 655468)
MESA SHOPPING CENTER EAST, Real Party in Interest and Respondent.	

APPELLANTS' REPLY BRIEF

(Filed Apr. 30, 2002)

Appeal from the Judgment of the
Superior Court of California
County of San Diego
Hon. Wayne L. Peterson

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* * *

APPELLANTS' REPLY BRIEF

INTRODUCTION

There are three fundamental points at risk of being lost in the briefing in this case.

The first is that Respondent City of San Diego (hereinafter "City") has an ethic of charging property owners for purported improvements to their property without their consent so as to avoid having the general public pay, even though a substantial beneficiary of such improvements is the public at large, as opposed to the property owner from whom the exaction is extracted.

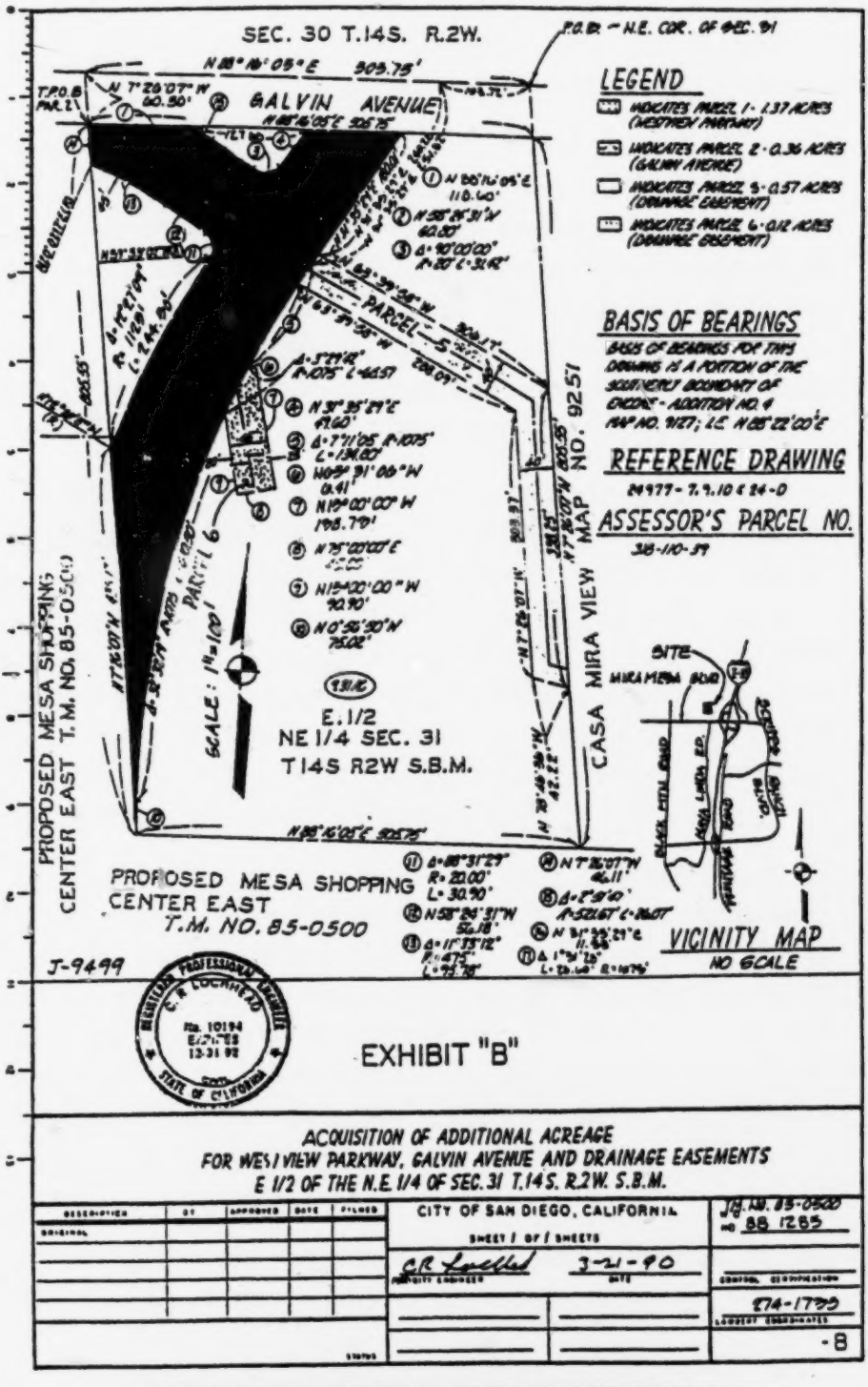
This is manifested in an approach which either extracts dedications in exchange for development permits, or, as in this case, purports to follow state and federal constitutional law by condemning a road right-of-way and paying just compensation for it, but then claiming, rightly or wrongly, that the very same property owner who has lost such right-of-way has somehow received a "benefit" of a value precisely equal to the cost of right-of-way acquisition and improvement of the road.

This approach is apparently now so basic to road improvement and maintenance analysis in San Diego that it does not even occur to the City that the net effect of it is to take property without compensation. That fact is patent from the City's Respondent Brief, which completely ignores the fact, demonstrated in the opening brief, that Westview Parkway does not merely serve the landowners adjacent to the project, but also many other users to the north.

An additional aspect of this is that nowhere in the record is there any analysis on behalf of either City or

Real Party in interest MESA SHOPPING CENTER EAST ("Real Party MSCE") which supports proportional benefit related to the last increment of assessment, which is clearly what is at issue here.

The drawing below, found at page 128 of the Administrative Record in case number D029343, provided Item 23 of Volume I of the Appendix to Appellant's Opening Brief in that case, and also at page 714 of Volume III of the Appendix to Appellant's Opening Brief in that case and incorporated into the Record on Appeal in this case, accurately depicts, in the black area, the dramatic taking of road right of way from Property Owners that occurred in this case.



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As the Court can see, it does not skirt the edge of the property, but rather trisects it into three pieces. The great bulk of the third assessment represented the cost of acquisition of the black area from Property Owner, the first two increments being for the improvements which City and Real Party MSCE now claim enhanced the value of Property Owners' property. It should be obvious to the Court that none of this right-of-way directly benefitted Property Owners, but rather such was entirely for the benefit of others, be they Real Party MSCE or the public.

However, rather than following the mandate of the prior Court of Appeal and discuss rough proportionality as to the third exaction, both City and Real Party MSCE take the entire $1,543,000 assessment and compare it to a theoretical enhancement in value of the Abrams property, and claim that there is proportional benefit. An honest review of the record shows that the City Council reviewed no analysis that showed whether or not the third, $545,000.00 increment, as opposed to the whole $1,543,000.00 assessment, benefitted the Abrams property. The only legitimate inference to be made from the record is that because all of the factors that give rise to the appraiser's opinion of theoretical enhancement of value are based on work attributable to the first two assessments, any assertion by City or Real Party MSCE of proportional benefit to Abrams from the third assessment, which is intended to reimburse nothing other than the roadway through Appellant's property, is simply inaccurate.

As a second matter, this is a case where there was and is **no evidence whatsoever** that Abrams ever applied to develop their property. This fact makes the imposition of some $1.5 million in liens, particularly the last

$545,000.00, on their property even more egregious than any of the state and federal cases that have questioned or nullified "exactions" that were imposed as conditions of development or improvement of property This factor also completely nullifies the assumption, based on a requirement of the previous Opinion by this Court, that the Abrams property was "benefitted". The effect of the City's action in this case is, ultimately, to prevent Abrams from developing their property for twenty years.

It might make general sense to suggest that by deciding to develop a shopping center which would create traffic impacts, to the extent those impacts result in the necessity of new roads, the developer should share in the cost of such new roads, in a fair way that balances those impacts with use by the general public. Here, the record is clear that the roads in question serve many others, hence it is completely unfair to claim that properties bordering the road should pay the full cost of the road as it passes through (or in this case, at least trisects) their property.

The third point is that the law upon which City apparently relies for its policy that it can take real property, either adjoining existing roads or that is part of the right of way of a new road, without compensating the owner [*Cogan v. City of Los Angeles* (1973) 34 Cal.App.3d 515 and *White v. County of San Diego* (1980) 26 Cal.3d 897] predate, and have been abrogated by, *Nollan v. California Coastal Commission* (1987) 483 U.S. 825, *Dolan v. City of Tigard* (1994) 512 U.S. 374, and *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854.

In sum, this is the case where the Court should tell the City of San Diego once again that its current approach is unacceptable and just like it treats its citizens who

approach the podium at public hearings, the Court should say loud and clear "Your time is up, your turn is over, the third assessment is stricken as unconstitutional!"

I. THE LAW UPON WHICH CITY RELIES TO SUPPORT ITS CONFISCATION OF RIGHTS OF WAY IS OBSOLETE.

City correctly notes that there were two assessments based on a formula that was determined before 1992. City incorrectly argues that this formula remained correct.

City entirely ignores the fact that rather than proceeding along the edge of the Abrams property, as is customary, City, at the behest of Real Party MSCE, put the entire right of way of the road through the middle of the Abrams property. Respondents ignore the fact that all benefits to the Abrams property resulting from the reimbursement district had already occurred through the first two exactions, the third being only for the road **through**, as opposed to **up to** Abrams property, such through road being of no benefit to Abrams. City also entirely ignores any public benefit that would result from the construction of these roads, in direct conflict with the traffic studies and earlier City Council analysis.

Separate and apart from the obsolescence of such cases due to subsequent United States and California appellate court decisions, is the fact that City put the **entire** right of way on the Abrams property (in the absence of any development application by Abrams), a factor that clearly distinguishes this case from *Cogan v. City of Los Angeles* (1973) 34 Cal.App.3d 515 and *White v. County of San Diego* (1980) 26 Cal.3d 897.

In *Cogan v. City of Los Angeles, supra*, 34 Cal.App.3d 515 the City of Los Angeles decided to widen Reseda Avenue and call it Reseda Boulevard. Cogan's property fronted Reseda Avenue, which had irregular sidelines because some properties had been developed with apartment buildings and some, like Ugan's had not. The Court of Appeal affirmed a dedication requirement of a strip along the edge of Cogan's property, based on the law in existence at the time. In that case, a significant portion of the construction cost of the road came from public gas tax funds, such that Cogan's assessment was approximately equal to the acquisition cost of the strip of land on the edge of his property. It should be noted that in that case, even though the Court of Appeal affirmed the assessment, it noted, at 521:

> It has long been held that an arbitrary, fixed policy of assessment back to the landowner without consideration of benefits on an individual basis is invalid, and a denial of due process to the landowner. (*Norwood v. Baker*, 172 U.S. 269 [43 L.Ed. 443, 19 S.Ct. 187]; *Spring Street Co. v. City of Los Angeles*, cited *supra; Dumas v. City of Sunnyvale*, 231 Cal.App.2d 796, 800 [42 Cal.Rptr. 302]; *City of Plymouth v. Superior Court*, 8 Cal.App.3d 454, 464 [96 Cal.Rptr. 636].)

That is exactly what has happened here.

Similarly, in *White v. County of San Diego* (1980) 26 Cal.3d 897, another case where road widening was partially financed by public funds, the California Supreme Court noted, at 909:

> The present case differs from *Spring Street* [*Spring Street Co. v. City of Los Angeles* (1915) 170 Cal. 24] in at least three respects. First,

there is no showing here of substantial disparity between the values of the rights-of-way taken from each parcel comparable to the showing in Spring Street of major differences between values of corner and mid-block lots. Here nothing appears to have made it unreasonable for the county to assume that the strips taken all would have substantially the same value in proportion to length, which varied directly with the parcel's frontage on the road.

A second difference from *Spring Street* is that the present assessments are based on amounts paid for land only and exclude items such as compensation for improvements and severance damage, which were included in the Spring Street assessments despite their irrelevancy as a measure of benefit.

In *Spring Street Co. v. City of Los Angeles* (1915) 170 Cal. 24, assessments for the widening of Eighth Street in Los Angeles were imposed against each abutting lot in the exact amount of a judgment awarded its owner in an action to condemn a five-foot strip for the project. Assessments on that basis were ordered in lieu of proposed assessments based on board-of-public-works estimates of the benefit each lot would receive. The condemnation awards and thus the assessments reflected the substantially greater worth of corner lots arising from their business frontage on important cross-streets in contrast to the proposed assessments, which were based on a determination that lots in the middle of blocks would receive proportionately greater benefit because of their exclusive dependence on the street being widened. The California Supreme Court invalidated the assessments, declaring that "the compensating benefit to the property owner is . . . the sole warrant . . . for . . . the burdens of

these special assessments. . . . [T]he outermost bound of law and reason . . . has been reached and passed by the assessment in this case." (170 Cal. at pp. 30-31.) Characterizing the assessment as "manifestly and . . . grossly unjust" (170 Cal. at p. 31), the court held that the city council's action was not conclusive and continued: "[S]till further we hold that the record here presented furnishes convincing evidence that the assessment was ordered prepared without the slightest exercise of judicial discretion, and so unwarrantedly, arbitrarily, and unjustly, as to work a confiscation of the property and to be, therefore, in no legal sense an assessment at all." (170 CAL at p. 32) How prescient, given *Nollan, Dolan*, and *Ehrlich*.

In *Ehrlich v. City of Culver City, supra*, 12 Cal.4th 854, the California Supreme Court summarized the current law this way, at 859:

> As we explain, we conclude that the tests formulated by the high court in its *Dolan* and *Nollan* opinions for determining whether a compensable regulatory taking has occurred under the takings clause of the Fifth Amendment to the federal Constitution apply, under the circumstances of this case, to the monetary exaction imposed by Culver City as a condition of approving plaintiff's request that the real property in suit be rezoned to permit the construction of a multi-unit residential condominium. **We thus reject the city's contention that the heightened takings clause standard formulated by the court in *Nollan* and *Dolan* applies only to cases in which the local land use authority requires the developer to dedicate real property to public use as a condition of permit approval.**

> We arrive at this conclusion not by reference to the constitutional takings clause alone, but within the statutory framework presented by the Mitigation Fee Act. (Gov. Code, § 66000 et seq.) We will conclude in this case that, in order to avoid substantial questions concerning the constitutional sufficiency of the legislative standard embodied in the act, the tests formulated by the high court in its *Dolan* and *Nollan* opinions for determining when a regulatory taking has occurred apply here to the act's requirement that the local regulatory authority demonstrate a "reasonable relationship" between the monetary exaction and the public impact of the development.
>
> We thus interpret the act's "reasonable relationship" standard, as applied to the development fee at issue in this case, as embodying the standard of review formulated by the high court in its *Nollan* and *Dolan* opinions – proof by the local permitting authority of both an "essential nexus" or relationship between the permit condition and the public impact of the proposed development, and of a **"rough proportionality" between the magnitude of the fiscal exaction and the effects of the proposed development**. (Emphasis added.)

This Court recognized this fact in the most recent opinion in this matter in case D029343, when it noted, at page 11 [App.-3, 13][1]:

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[1] Abrams specifically request [sic] the Court to consider the original Reporter's Transcripts and Appellant's Appendices from the previous two Appeals, D019566 (Appeal 1 and D029343 (Appeal 2)

(Continued on following page)

> There is no evidence in the record that the city council considered proportionality when **increasing** the reimbursement fee against Abrams's property. Abrams's attorney spoke for 15 minutes after his request for continuance was denied. The record shows no determination by the city council that the **additional** assessment was roughly proportional to benefits purportedly received by Abrams, and the city council did not identify any proposed benefit. . . . (Emphasis added.)

The administrative record before the city council does not contain any discussion of proportionality of any **increase** in the reimbursement fee (as opposed to the entire fee) and does not show that the **additional** assessment was roughly proportional to the benefits purportedly received by Abrams (or, to quote Ehrlich directly, proportional to "the effects of the proposed project." (12 Cal.4th at 859.) The logical reason for this is that any benefit that inured to the Abrams property from the reimbursement district occurred through the first two assessments, and the third assessment is not attributable to any actual benefit to the Abrams property.

In his dissent in *White*, the late Justice Mosk made the following comment, also prescient, at 910:

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pursuant to California Rules of Court rule 11(b). This would be considered "Appeal 3". Hereinafter, all references to the Reporter's Transcript will appear as "RT-Appeal number, page number". References to the Appellants' Appendix in lieu of Clerk's Transcript shall appear as "App. – Appeal number, page number".

> The county's scheme is a cynical method of automatically shifting the cost of an improvement benefitting the public onto the backs of a few landowners because of the fortuity of their location. Not only do the landowners lose a portion of their property, but they are then deprived of the constitutionally required compensation for the taking. (Cal.Const., art. I, § 19.) I strongly disapprove of this acquisitive device by which a public entity, in order to obtain private property, puts funds therefor in a landowner's pocket – and then proceeds to pick the pocket.

That is exactly what happened here with the third exaction. But, as demonstrated below, *Nollan-Dolan* and *Ehrlich* save the day and Justice Mosk's concern is alleviated. In *Ehrlich*, the California Supreme Court embraced a metaphor, similar to the one in frequent use by the United States Supreme Court, as follows: On [sic] of the central premises of the takings clause is that truly public burdens will be publicly borne . . . the *Nollan* test helps to secure that promise by assuring that the monopoly power over development permits is not illegitimately exploited by imposition of conditions that lack any logical affinity to the public impact of a particular land use. (*Ehrlich v. City of Culver City, supra*, 12 Cal.4th 854, at 876.) Please see also section II of Justice Kennard's dissent in *Ehrlich v. City of Culver City, supra*, 12 Cal.4th 854, at 905-906.

II. THE CITY'S PROPORTIONALITY ANALYSIS IS FLAWED IN THREE FATAL RESPECTS.

At page 15 of its Respondent Brief, City attacks Abrams' description of what should be required for a showing of proportionality, claiming it is unsupported by

law. In fact, it is supported by *Spring Street Co. v. City of Los Angeles* (1915) 170 Cal. 24, *Nollan v. California Coastal Commission* (1987) 483 U.S. 825, *Dolan v. City of Tigard* (1994) 512 U.S. 374, and *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854.

A. City's approach of estimated increase in market value of the Abrams property, standing alone, is unsupported in the law, and fails to isolate the third assessment, which is the one at issue in this case.

A review of the record shows that the sole basis for the finding of benefit to Appellant was the opinion of Randy Tagg, an appraiser, that the property had been enhanced in value by $2,000,000.00 by the totality of the improvements including both the prior two assessments and the second increase, without segregating one from another. [App.-3, 503]

City offers no legal authority to support the proposition that an appraisal opinion indicating an enhancement of market value of the Abrams property alone is a sufficient basis for a finding of rough proportionality, much less one which does not isolate the amount in controversy. City also offers a lengthy description of purported physical enhancements to the Abrams property at pages 17 to 24 of its Respondent's Brief which completely ignores the fact that the some $998,000.00 of assessment that relates to such improvements remains on the Abrams property and is not being challenged here.

City offers no appraisal opinion that the value of the Abrams property was enhanced by $2,000,000.00, or for that matter, any amount whatsoever, by the condemnation

and taking of the road right of way through the middle of it. Logic would dictate that from an access standpoint, only that portion of the road that leads up to, but does not cross the Abrams property would arguably be an enhancement to the value, and that portion of the road was already subsumed in the prior assessments, which remain in effect.

This new assessment was for the sole purpose of constructing the very portion of the road that trisected the Abrams property. This additional increment benefitted only the properties to the north of the Abrams property, including the general public, but did not benefit the Abrams property at all.

B. The City's position that rough proportionality of benefit from a road can be determined without a traffic survey makes no sense.

City argues, at 26, that it need not consider traffic surveys in its determination of rough proportionality, taking the position that the prior opinion of this Court did not require such. Abrams submit that the prior opinion of this Court did not give any specific prescription or formula for the determination of rough proportionality. One would think logically, however, that a comparison of street usage between the subject properties, the properties in the district, and the general public would be necessary for any determination of proportionality. *Dolan* and *Ehrlich*, both binding on this Court as the supreme law, stand in the way of such nonsense. How else would City satisfy the mandate of *Ehrlich*: ". . . proof by the [City] . . . of a 'rough proportionality' between the magnitude of the fiscal

exaction and **the effects of the proposed development.**" (*Ehrlich v. City of Culver City, supra*, 12 Cal.4th 854, at 859, emphasis added.)

City's assertion, at page 28, that all property owners along Westview Parkway were treated equitably is simply false, for two reasons:

First, the analysis at page 29 regarding the relative dedications/assessments for Mira Mesa Boulevard, Westview Parkway, and Galvin Avenue are misleading, both because the improvements other than those trisecting the Abrams property had already been included in the prior $998,000.00 assessment, and because it tortures the analysis of *White v. County of San Diego, supra*, 26 Cal.3d 897, however dated, by assuming that a full right of way is the same as frontage.

Similarly, the analysis at page 30 about access by the Abrams property from Westview Parkway to Black Mountain Road and any value attributable thereto is entirely speculation. Logic would dictate that under current zoning, any upzoning being entirely speculative, an 87 unit apartment building would access from Mira Mesa Boulevard, and that access to the Abrams property was already included in the earlier assessments.

C. <u>The City misdescribes the effect of the third assessment with respect to access to the Abrams property</u>.

At page 31 of its Respondent's Brief, City asserts that Abrams has not been assessed for the portion of Westview Parkway providing for local traffic movement, contending that Abrams has only been assessed for the portion of the street that accesses their property. This is simply false.

The record reflects that the reason for the third assessment is because Abrams refused to allow City to take a wide cross-shaped swath out of the middle of their property for use by others without paying for it. Please see the drawing at page 2 of this brief for an accurate depiction of same. The rest of the project was in place and Abrams were already assessed for it. The additional $545,000.00+ that is the subject of this action is attributable only to the wide swath taken out of the middle of the Abrams property, which was and is not an enhancement of value, and, more importantly, is not "access" to the Abrams property.

If City were to be candid about the effect of traffic analysis on this situation the fact would be that the Abrams property should only have been assessed the portion of the cost of Westview Parkway leading up to it, based on the proportion its potential use in vehicle trips compares to the total use in vehicle trips by both the other participants in the assessment district and the general public. The record shows absolutely no effort to do this.

This failure is a fundamental, egregious ongoing constitutional flaw in the City's right of way acquisition and improvement process that continues to cry out for judicial adjustment.

III. THE PRIOR CONFUSION BETWEEN *WHITE* AND *EHRLICH* – BETWEEN "BENEFIT" AND "THE EFFECTS OF THE PROPOSED DEVELOPMENT" SHOULD NOT CONFUSE THIS COURT NOW.

Abrams has herein addressed City's "benefit" argument and fatally destroyed it as well, even though

fundamentally, this Court's slippage into the "benefit" terminology at page 10 of its March 6, 2000 Opinion is not faithful to the mandates of *Dolan, supra*, or even *Ehrlich, supra*. This Court accurately **quoted** the *Ehrlich* mandate at the bottom of page 9 and the top of page 10 of the March 6, 2000 Opinion [App.-3, 11-12] as ". . . agency must prove . . . a 'rough proportionality' between the magnitude of the fiscal exaction and the effects of the proposed development," and then without explanation segued to the outdated "benefit" language of the abrogated *White* case.

While it does not appear that *White* was expressly disapproved, in *Ehrlich*, the California Supreme Court embraced the Supremacy Clause (Article VI of the United States Constitution) as never before in land use matters, and the supremacy of *Nollan-Dolan* is beyond doubt.

Similarly, this Court apparently mixed *White* with *Ehrlich* in regard to the standard of review. Without citation to *Ehrlich*, this Court, in its March 6, 2000 Opinion, affirmed the trial court's "substantial evidence" standard. No harm, no foul, as this Court affirmed the Judgment in favor of Abrams anyway. But, in this new appeal, the Court should carefully note that *Ehrlich* held ". . . when [government] imposes special, discretionary permit conditions on development by individual property owners . . . *Nollan* and *Dolan* require that such conditions, whether they consist of possessory dedications or monetary exactions, be scrutinized under the heightened standard." (*Ehrlich v. City of Culver City, supra*, 12 Cal.4th 854, at 881.) Please see also *Id.*, at 876.

CONCLUSION

The effect of the Judgment in this case is to enable City to steal over two acres of Abrams' property, entirely for the benefit of MSCE and others, without paying for it. Respondents' respective briefs do not mitigate this unavoidable fact.

As soon as City abandoned all effort to compare the relative benefit of Westview Parkway and Galvin Avenue to Abrams' property with that of all others with access to same, relative to the third exaction as opposed to the full assessment, it violated Abrams' constitutional rights to be free from a taking of their property without compensation. This Court previously recognized that a failure to make a fair determination of proportionality when **increasing** the reimbursement fee by the **additional assessment** violated the law. (Court of Appeal Opinion dated March 6, 2000, at page 11 [App.-3, 13])

The trial court's decision to accept a purported analysis of "proportionality" that did not require a comparison of relative benefit, or of benefit of the fees attributable to the additional exaction at all, compounded City's violation of Abrams' constitutional rights under the *Nollan-Dolan* doctrine.

That Judgment was in error, since there is no evidence in the record of any analysis of proportionality except the continued use of the "unfounded allocation presumption" and a subsequent assumption of enhancement of the gross value of Abrams' property based on all three exactions, both of which are, themselves, contrary to law.

The Judgment should be reversed and the Superior Court should require Respondent City of San Diego to rescind the third exaction, since it was not, is not, and cannot be based on any evidence that satisfies the "rough proportionality" mandates of the United States Constitution as interpreted by the *Nollan-Dolan* doctrine.

Dated: April 30, 2002

Respectfully submitted,
LAW OFFICES
OF LOUIS E. GOEBEL

By: /s/ Louis E. Goebel
Louis E. Goebel,
Attorney for
Appellants CLEM
ABRAMS and
JOHN BOHANNON

* * *

APPENDIX H

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

CLEM ABRAMS, *et al*, Petitioners and Appellants, v. CITY OF SAN DIEGO, Respondent,	) No. 4 Civil D038402) (San Diego County) Superior Court Case) No. 655468)
MESA SHOPPING CENTER EAST, Real Party in Interest and Respondent.	)

PETITION FOR REVIEW

(Filed Dec. 6, 2002)

On Appeal from the Judgment of the
Superior Court of California
County of San Diego
Hon. Wayne L. Peterson

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CLEM ABRAMS and
JOHN BOHANNON

* * *

TO: THE HONORABLE RONALD GEORGE, CHIEF JUSTICE OF CALIFORNIA, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA

Petitioners and Appellants Clem Abrams and John Bohannon (hereinafter "Appellant Property Owners") hereby petition for review of the decision of the Court of Appeal of the State of California, Fourth Appellate District, Division One, filed in this action on October 29, 2002, affirming the Judgment of the Superior Court of California, County of San Diego, denying Mandamus relief to Appellant Property Owners.

The Court of Appeal's Slip Opinion is attached hereto as Appendix A.

GROUNDS FOR REVIEW

Review of the Court of Appeal Slip Opinion is required under California Rule of Court, Rule 29(a), in order to resolve important issues of statewide concern and secure uniformity of decision as to the question of whether a public agency can exercise eminent domain powers to take real property interests, and then "assess" back the acquisition cost to the property owner as a "benefit," based on the obsolete case of *White v. County of San Diego* (1980) 26 Cal.3d 897, thereby taking real property without compensation. The Slip Opinion is contumacious of settled Federal and State Constitutional principles, including those mandated by *Dolan/Nollan* [*Dolan v. City of Tigard* (1994) 512 U.S. 374 and *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854.]

More than one Justice of the United States Supreme Court has been heard to question the compliance of the California State Courts with the Fifth Amendment "takings" jurisprudence the High Court has devised in several seminal cases, particularly, *Dolan*, *supra*. This Court acknowledged the supremacy of such holdings in its *Ehrlich* opinion, *supra*.

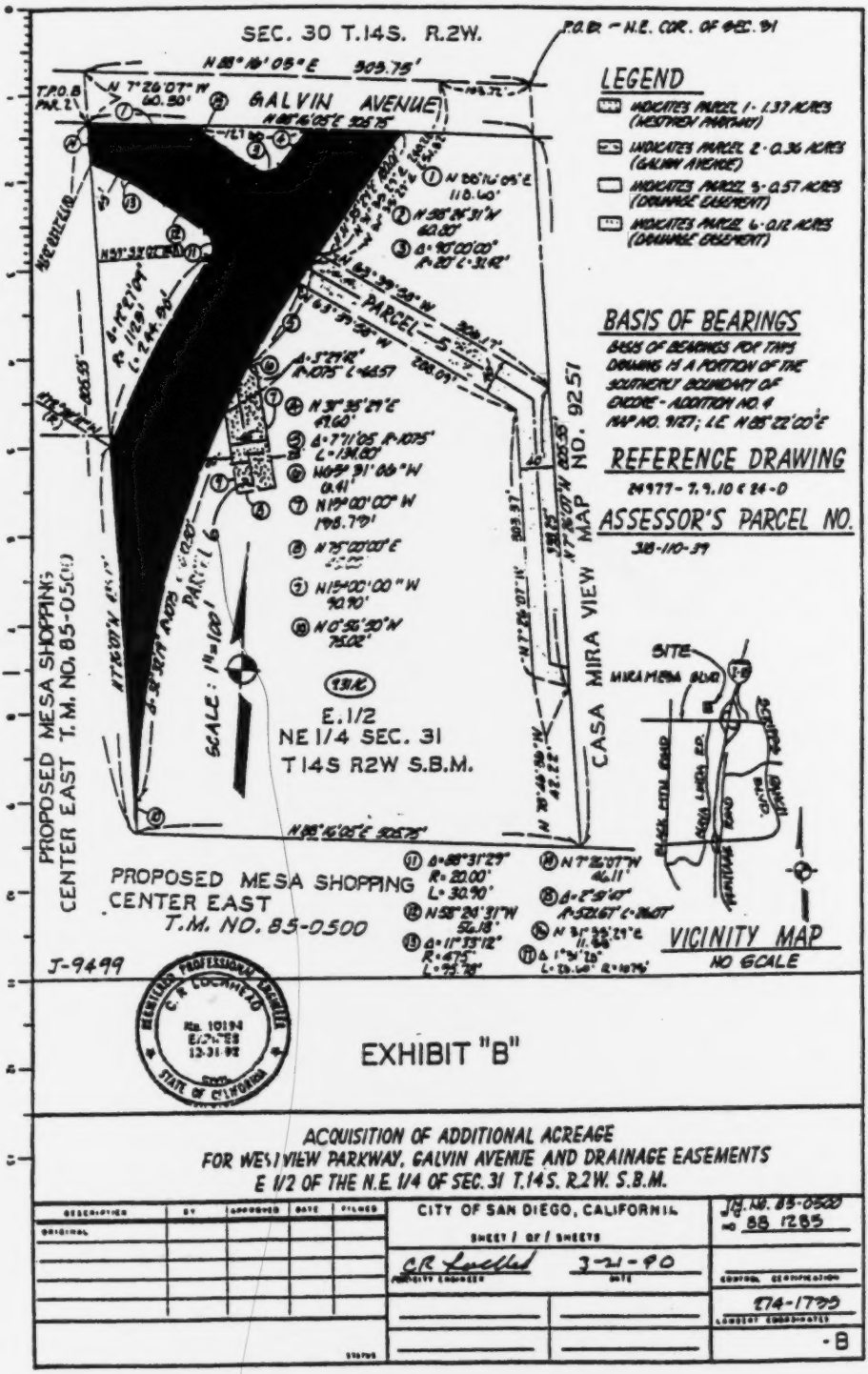
Now, in this case, a California Court of Appeal has spurned the High Court's teachings (even though its error was clearly brought to its attention.) This case is then a "poster child' for the unease already voiced by the High (Court without focusing on one specific case.

This Court has a duty and an obligation to right the wrong, thereby assuring the High Court that the application and supremacy of its property rights edicts are in fact being honored in California, and thereby forestalling yet another California property rights case from reaching the docket of the High Court.

PROLOGUE

As the old saying goes, "a picture is worth a thousand words."

This drawing accurately depicts, in the black area, the dramatic taking, ultimately without compensation, of road right of way from Appellant Property Owners that occurred in this case.



BEST AVAILABLE COPY

As the Court can see, it does not skirt the edge of the property, but rather trisects it into three pieces. It should be obvious to the Court that none of this right-of-way directly benefitted Property Owners, but rather such was entirely for the benefit of others, be they Real Party MSCE or the public.[1] Despite this, the Court of Appeal affirmed resort to *White v. County of San Diego* (1980) 26 Cal.3d 897 as a basis for commandeering "right-of-way" and then assessing back its cost, based on a theory that this roadway "benefitted" the property.

The unpublished Opinion in this case creates new (but wrong) law in four fundamental respects:

- At page 12, the Opinion states "the *Dolan/Nollan* [*Dolan v. City of Tigard* (1994) 512 U.S. 374/*Nollan v. California Coastal Commission* (1987) 483 U.S. 825] test requires that the assessment be roughly proportional to the **benefit** received by the property." (Emphasis added) There is no previous decisional law support for this conclusion. The Opinion effectively concedes [sic] is made up [sic] the new rule.

- At page 14, the Opinion states "Because Abrams' timely-filed petitions challenged only the June 1992 *increase* in the amount of the costs reimbursement . . . he effectively waived any argument that those district improvements did not benefit his property or were otherwise proper." Again, there is no previous decisional law support for the conclusion that if the initial

[1] This drawing is found at page 128 of the Administrative Record in case number D029343, provided Item 23 of Volume I of the Appendix to Appellant's Opening Brief in that case, and also at page 714 of Volume III the Appendix to Appellant's Opening Brief in that case and which is incorporated into the Record on Appeal in this case.

assessment is not challenged, the public agency has *carte blanche* to make whatever project changes and further assessments it deems appropriate. In this case, the project was changed after the first two assessments to shift the burden of the right-of-way entirely onto Appellants. Both *Dolan* and *Ehrlich* deal with each separate assessment individually.

- At page 17, the Opinion, in reference to the City's reference to the Tagg Appraisal and the Foamier report, states "In so doing, City made the required individualized determination regarding the degree of connection between the exaction imposed (e.g., the cost reimbursement lien) and the projected impact (e.g., benefit to Abrams property) of the district improvements" citing *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854, 879-880; and *Dolan v. City of Tigard* (1994) 512 U.S. 374, at 391, 395-96. Appellants submit that any financial "benefit" attributable to the right-of-way acquisition was properly the subject of the eminent domain action, such that any such analysis had already been waived by the earlier settlement. Moreover, neither *Dolan* nor *Ehrlich* mandate the unilateral use of appraisal opinions as a basis for exactions.

- The Opinion states, at 18, that "City was not required to apply the rough proportionality test based on evidence regarding current and/or projected vehicle traffic on Westview Parkway and Galvin Avenue" noting that Appellants did not cite any case law supporting the idea that rough proportionality of exaction should be based on relative use of the improvements for which the exaction is made. However, neither the Opinion nor the briefing by City or Real Party provide any previous decisional authority that contradicts this view, and, in fact, it demonstrates misapplication of City policy 200-1 at footnote 8, which distinguishes between types of uses of road improvements.

In sum, the Opinion creates a four pronged San Diego specific body of new law that allows government agencies to take rights-of-way for major thoroughfares without compensation in a manner repugnant to the *Dolan/Nollan/Ehrlich* doctrines.

BACKGROUND

This is a case where Appellant Property Owners, holders of nine acre parcel of property in the Mira Mesa area of Respondent City of San Diego ("City"), had the misfortune to be located directly adjacent to a 23.8 acre parcel owned by Real Party in Interest MSCE ("MSCE"), a shopping center developer.

Appellant Property Owners had no present intention of developing their property. MSCE, on the other hand, had immediate intentions to subdivide and develop its property, and in furtherance of that goal sought to obtain approval of a subdivision map.

Part of the subdivision map review process involved an analysis of the on site and off site physical improvements required for the project. In this case, City officials determined that Mira Mesa Boulevard needed to be widened, Galvin Avenue needed to be widened, and a new major, regional thoroughfare, ultimately called Westview Parkway, needed to be constructed.

MSCE obtained approval of its tentative subdivision map with a number of conditions which included the improvements to Mira Mesa Boulevard and Galvin Avenue, and the construction of Westview Parkway.

When the project was proposed, there were two potential alignments for Westview Parkway and Galvin

Avenue. One followed the property line between Appellant Property Owners' and MSCE's respective properties, and the alternate would be largely on Appellant Property Owners' property, consuming approximately two of the nine acres, and cutting Appellant Property Owners' property up into three pieces, one of which would abut MSCE's property, and another of which would be virtually useless because of its small size. [App.-2, 128][2]

The record contains no evidence as to why the alternative alignment was selected, but as this matter has evolved, a significant reason has become apparent.

The City of San Diego has developed a pattern of circumventing the eminent domain process for the acquisition of private real property for public use in exchange for just compensation, as contemplated in Title 7 of the California Code of Civil Procedure, sections 1230.010, *et seq.*, by either requiring dedications, or, if the person or entity from whom the property is to be taken is not a current applicant for permission to develop, by proclaiming that the property is "benefitted" by the development such that an assessment lien can be placed upon it.

In this case, the vehicle for the creation of the aforementioned assessment lien was a "cost reimbursement district," pursuant to which the City of San Diego required that the developer, MSCE, "front" the cost of the improvements, including Westview Parkway and Galvin Avenue, with the understanding that Appellant Property Owners and other property owners in the area would be required

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[2] Hereinafter, all references to the Appellants' Appendix in lieu of Clerk's Transcript shall appear as "App.-Appeal number, page number".

to "reimburse" MSCE for a portion of those costs. These reimbursements, hereinafter referred to as "exactions" would be in the form of liens on the properties, payable if any development application over $20,000.00 were submitted at any time within the next twenty years.

An additional aspect of the policies of the City of San Diego is that somewhere along the line a custom evolved, which was that it could be assumed, without further analysis, that any property that suffered a condemnation of any portion thereof for road improvements was "benefitted" by the portion of the road improvements located on that property. One could reasonably speculate this "assumption" arose from, among other things, the case of *White v. County of San Diego* (1980) 26 Cal.3d 897,[3] wherein the Supreme Court upheld an assessment against property owners on either side of Mission Gorge Road for improvements to the road consisting of widening and the installation of medians and signals. In that case, the Supreme Court specifically approved of an approach which surcharged those properties whose frontages were taken by condemnation but did not charge those properties whose owners dedicated their frontage strips.

Unfortunately, somehow officials of the City of San Diego and the land use development consultants who work with them allowed the holding in *White* to be translated into a "rule of thumb," hereinafter referred to as the

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[3] As this Brief will demonstrate, the validity of City's interpretation of the *White* case should, by now, be in serious doubt, given the holdings in *Dolan v. City of Tigard*, *supra*, 512 U.S. 374, *Nollan v. California Coastal Commission*, *supra*, 483 U.S. 825, and *Ehrlich v. City of Culver City*, *supra*, 12 Cal.4th 854.

"unfounded allocation presumption," that if real property was condemned for road purposes leaving a remainder parcel, the remainder parcel was "benefitted" to the extent of the cost of the condemnation, and the proportion of the cost allocable to the remainder parcel was that represented by the portion taken compared to the portion taken from the adjoining property.

Put another way, if the center of the new road goes down the property line between two properties, they share the cost equally, but if the road is fully on the property of one property owner, going down the edge adjacent to the other property, the property owner upon whose property the road is built bears the entire cost of site acquisition and development. This approach is not only illegal generally, but, as will be shown herein, is in direct violation of the City Council's own policy 200-1 [App.-2, 1], discussed in more detail, *infra*.

Earlier MSCE took the position that the aforementioned "unfounded allocation presumption" results in the "proportionality" required by the Fifth Amendment of the United States Constitution as described in *Dolan v. City of Tigard*, *supra*, 512 U.S. 374, *Nollan v. California Coastal Commission*, *supra*, 483 U.S. 825, and *Ehrlich v. City of Culver City*, *supra*, 12 Cal.4th 854, such that no further demonstration of proportionality need be made.

In this case, that meant that if MSCE was shrewd enough to cause the alignment of Westview Parkway and Galvin Avenue to veer entirely onto Appellant Property Owners' property, MSCE could avoid having to pay for Westview Parkway and Galvin Avenue and save the other property owners in the cost reimbursement district from sharing in this expense. The City of San Diego cooperated

fully with MSCE's plan, in violation of its own policy, number 200-1. [App.-2, 1]

In connection with MSCE's development, the MESA SHOPPING CENTER EAST COST REIMBURSEMENT DISTRICT NO. 4045 ("the DISTRICT") was purportedly formed and implemented in 1990 pursuant to San Diego Municipal Code §62.0208. [App.-3, 382, 406] This process generally permits the first developer of property to fund the construction of public improvements benefitting not only that property, but other adjoining property and to secure a claim for proportionate reimbursement from other benefitted owners, if and when they develop.

Once the project was underway, MSCE and City decided that Westview Parkway and Galvin Avenue should be entirely within the confines of Appellant Property Owners' property, resulting in a division of the property into two small parcels and one larger parcel. In July of 1990, MSCE requested that additional costs be charged to Appellant Property Owners' property, increasing their total cost to $998,299.00. [App.-3, 382] Appellant Property Owners also did not object to this first amendment, which included a budget for $200,750.00 for acquisition of right-of-way across Appellant Property Owners' property, and a budget for the installation of a major storm drain across Appellant Property Owners' property.

The effect of this was that the cost reimbursement district was formed, and "exactions," in the form of liens placed on Appellant Property Owners' property were made, first in the amount of $570,948.00 and then increased to the total amount of $998,299.00. Appellant Property Owners tolerated these first two exactions.

Appellant Property Owners had not been seeking to develop their property, so City could not use its usual tactic of requiring dedication of the road right-of-way as it passed Appellant Property Owners' property.[4] The only way City could obtain the right-of-way of Westview Parkway and Galvin Avenue that would occupy 25% of Appellant Property Owners' property, in a time frame suitable to MSCE, was to condemn it. This condemnation was fully litigated, resulting in an award of $641,358 to Appellant Property Owners. [App.-3, 443]

In June 1992, City held a hearing on the increased cost and its allocation among the Appellant Property Owners. Appellant Property Owners opposed the proposed increase by letter and at the hearing. At the hearing, Appellant Property Owners sought a continuance which was denied, and, after a fifteen minute presentation, the city council, with one dissenting vote, approved the third cost reimbursement assessment against Appellant Property Owners. [App.-3, 443-44]

Appellant Property Owners therefore sought a Writ of Mandate, for the purpose of causing City Council to conduct a full and fair hearing as to the issue of whether Appellant Property Owners were being liened to an extent disproportionate to the benefit their property obtained from the improvements that are the subject of the "cost reimbursement district." [App.-3, 444]

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[4] Such a dedication would not have passed constitutional muster in any event, given the ultimate alignment the CITY chose for the road, which was entirely inside the property and consumed approximately 25% of its area.

Ultimately, the trial court disagreed with City's approach as to proportionality, ruling that it was up to City of San Diego to demonstrate a factually sustainable proportionality between the effects of the increased costs of $545,251.18 assessed through the cost reimbursement district on June 23, 1992 and the exaction with which Appellant Property Owners had taken issue. [App.-3, 444]

MSCE appealed, and this Court affirmed that determination, in case number D029343. [App.-3, 452]

The effect of the Opinion in D029343 was that City Council would be required to hold a proper hearing on the question of the proportionality of the benefits related to the exaction, so as to create a record permitting judicial review of that question, if necessary.

The Opinion stated, at 11:

> To impose a cost reimbursement lien on Abrams's property, the City must prove that an essential nexus exists between the assessment and the benefit of public improvement and that the amount of the assessment is roughly proportional to the benefit to the property of the street improvement. Because there is no evidence of proportionality, the trial court correctly determined that insubstantial evidence supported the action by the city council. [App.-3, 450]

City then scheduled another hearing on the question of the third exaction, Appellant Property Owners specifically took issue with the question of proportionality, requesting a continuance so that they could have experts present a more appropriate description of proportionality. [App.-3, 396, 457-59] This request was granted.

On June 19, 2000, the City Council held its regular meeting, which included, as item 205, "Addendum to the Mesa Shopping Center East Cost Reimbursement District Agreement" with a City Manager's recommendation to adopt a resolution "[r]e-affirming that a factually sustainable proportionality exists between the June 23, 1992 amendment to the Mesa Shopping Center East Cost Reimbursement District and the benefit to the Abrams/Bohannon property." [App.-3, 422]

Appellant Property Owners were allowed **two minutes** on the record, the transcript of which only takes up two pages, [App.-3, 425-27] and City adopted the resolution, based on a report from a "public finance consultant," (the "Fournier Report") which included a purported engineering analysis and an appraisal of the land. [App.-3, 464-596] The Fournier Report contained a purported "benefit analysis" involving only Appellant Property Owners' property, which concluded with the opinion that the value of Appellant Property Owners' property had risen based on the "improvements" hence had been benefitted. [App.-3, 471-74]

City's consultant noted that this condemnation award was $440,000.00 more than the budget as of the first amendment. This consultant, Fournier, then sums up what City did:

> Accordingly, on April 20, 1992, the cost reimbursement engineer, Wildan Associates, prepared and submitted its report regarding the final cost of improvements and right-of-way acquisition, and proposed spreading the costs that had increased from that which was estimated at the time of the first amendment to the cost reimbursement district. It had by that time been

> determined that the cost of right-of-way acquisition, including attorney's fees and other litigation expenses, was $696,905.66, of which $641,358 was the right-of-way compensation agreed to be paid and actually paid to the owners of the Abrams/Bohannon parcel. This represented a total increase of $496,000 from the estimate for right-of-way acquisition costs which was used at the time of prior amendment to the reimbursement district. **This entire amount, together with approximately $49,000 of the increase in overall improvement costs experienced by the district, was then assessed to the Abrams/Bohannon parcel by an amendment to the district passed by the City Council on June 23, 1992**. [App.-3, 467-68, emphasis added.]

At the June 19, 2000 hearing, the additional lien was approved with no record whatsoever containing an actual demonstration of any sort of calculation regarding proportionality as between the various properties benefited by the Westview Parkway and Galvin Avenue improvements. [App.-3, 424-30]

Appellant Property Owners therefore filed a Supplemental Petition for Writ of Mandate, [App.-3, 18] seeking to have the trial court tell City that it had used the wrong standard. The trial court denied the Supplemental Petition, holding:

> The Court of Appeal's Opinion does not require a calculation of the traffic that petitioners' parcel might someday generate. The better way to identify benefit is to determine what a willing buyer would pay for the property before and immediately after the improvements were constructed, as the City has done. Using this

> standard of proportionality, the record establishes a substantial evidence of proportionality. (See City's points and authorities, 18:15-19:7.) Nor has a procedural due process violation been shown. (City's points and authorities 19:22-20:4.) [App.-3, 676, 677-78]
>
> This Appeal timely followed. [App.-3, 680]

The Court of Appeal filed its unpublished Opinion in this case on October 29, 2002. That Opinion affirmed the Trial Court's decision. Appellant Property Owners filed a Petition for Rehearing which was summarily denied. A true and correct copy of the Court of Appeal Order in that regard is attached hereto as Exhibit "B".

LEGAL ISSUES PRESENTED

1. Did the Court of Appeal err, in holding, at page 12, that the *Dolan/Nollan* test requires that an assessment be roughly proportional to the **benefit** received by the property in the absence of decisional law support for such a conclusion?

2. Did the Court of Appeal err in holding, at page 14, that if an initial special assessment is not challenged by an affected property owner, the public agency has *carte blanche* to make whatever project changes and further assessments it deems appropriate, even if the project is significantly changed?

3. Did the Court of Appeal err in holding, at page 17, that a simple appraisal constitutes the required individualized determination regarding the degree of connection between the exaction imposed (e.g., the cost reimbursement lien) and the projected impact (e.g., benefit to the property owners' property) of the district improvements, citing *Ehrlich v. City of Culver City*,

supra, 12 Cal.4th 854, 879-880; and *Dolan v. City of Tigard*, *supra*, 512 U.S. 374, at 391, 395-96, when neither *Dolan* nor *Ehrlich* mandate the unilateral use of appraisal opinions as a basis for exactions?

4. Did the Court of Appeal err in holding, at page 18, that a public agency was not required to determine the existence of rough proportionality of the exaction, as required by *Dolan* and *Ehrlich* by comparing evidence regarding the level of current and/or projected public and neighboring vehicle traffic on the streets for which the right of way is taken by such public agency, as opposed to vehicle traffic attributable to the property owner's permitted use?

I. THE COURT OF APPEAL ERRED IN EQUATING "BENEFIT" WITH "ROUGH PROPORTIONALITY"

In *Ehrlich v. City of Culver City*, *supra*, 12 Cal.4th 854, the California Supreme Court summarized the current law this way, at 859:

> As we explain, we conclude that the tests formulated by the high court in its *Dolan* and *Nollan* opinions for determining whether a compensable regulatory taking has occurred under the takings clause of the Fifth Amendment to the federal Constitution apply, under the circumstances of this case, to the monetary exaction imposed by Culver City as a condition of approving plaintiff's request that the real property in suit be rezoned to permit the construction of a multi-unit residential condominium. **We thus reject the city's contention that the heightened takings clause standard formulated by the court in *Nollan* and *Dolan* applies only to cases in which the local land use authority requires**

> **the developer to dedicate real property to public use as a condition of permit approval.**
>
> We arrive at this conclusion not by reference to the constitutional takings clause alone, but within the statutory framework presented by the Mitigation Fee Act. (Gov. Code, § 66000 et seq.) We will conclude in this case that, in order to avoid substantial questions concerning the constitutional sufficiency of the legislative standard embodied in the act, the tests formulated by the high court in its *Dolan* and *Nollan* opinions for determining when a regulatory taking has occurred apply here to the act's requirement that the local regulatory authority demonstrate a "reasonable relationship" between the monetary exaction and the public impact of the development.
>
> We thus interpret the act's "reasonable relationship" standard, as applied to the development fee at issue in this case, as embodying the standard of review formulated by the high court in its *Nollan* and *Dolan* opinions – proof by the local permitting authority of both an "essential nexus" or relationship between the permit condition and the public impact of the proposed development, and of a **"rough proportionality" between the magnitude of the fiscal exaction and the effects of the proposed development**. (Emphasis added.)

The "benefit" test described at page 12 of the Opinion is simply not the same as the test described in *Ehrlich* which refers to "effects of the proposed development." The Court of Appeal made up a new rule which is not

supported by current legal authority and is flatly in conflict with *Dolan* and *Ehrlich*.

II. THE COURT OF APPEAL ERRED ON HOLDING THAT FAILURE TO OBJECT TO THE INITIAL ASSESSMENT WAIVES SUBSEQUENT OBJECTIONS TO CHANGES IN THE PROJECT OR INCREASES IN THE ASSESSMENT.

The record reflects that when the original assessment district was implemented and the first supplemental assessment was initiated, the right-of-way went alongside, as opposed to through, Appellant Property Owners' property.

However, at page 14, the Opinion states "Because Abrams' timely-filed petitions challenged only the June 1992 *increase* in the amount of the costs reimbursement . . . he effectively waived any argument that those district improvements did not benefit his property or were otherwise proper." Again, there is no previous decisional law support for the conclusion that if the initial assessment is not challenged, the public agency has *carte blanche* to make whatever project changes and further assessments it deems appropriate. In this case, the project was changed after the first two assessments to shift the burden of the right-of-way entirely onto Appellants.

The Opinion fails to account for the fact that after the second assessment, at the request of Real Party, the project was changed, to shift the right-of-way from the boundary between Real Party's and Appellants' respective properties, **entirely onto Appellant Property Owners'**

property, as depicted in the drawing incorporated into Appellants' Reply Brief.

In his dissent in *White v. County of San Diego, supra,* 26 Cal.3d 897, the late Justice Mosk made the following comment, at 910:

> The county's scheme is a cynical method of automatically shifting the cost of an improvement benefitting the public onto the backs of a few landowners because of the fortuity of their location. Not only do the landowners lose a portion of their property, but they are then deprived of the constitutionally required compensation for the taking. (Cal.Const., art. I, § 19.) I strongly disapprove of this acquisitive device by which a public entity, in order to obtain private property, puts funds therefor in a landowner's pocket – and then proceeds to pick the pocket.

That is exactly what happened here with the third exaction after the right-of-way change. *Dolan/Nollan* and *Ehrlich* appear intended to alleviate Justice Mosk's concern, but apparently not in Division One of the Fourth District.

In *Ehrlich*, the California Supreme Court embraced a metaphor, similar to the one in frequent use by the United States Supreme Court, as follows:

> One of the central premises of the takings clause is that truly public burdens will be publicly borne . . . the *Nollan* test helps to secure that promise by assuring that the monopoly power over development permits is not illegitimately exploited by imposition of conditions that lack any logical affinity to the public impact of a particular land

> use. (*Ehrlich v. City of Culver City, supra*, 12 Cal.4th 854, at 876.)

Please see also section II of Justice Kennard's dissent in *Ehrlich v. City of Culver City, supra*, 12 Cal.4th 854, at 905-906. Please see also *Armstrong v. United States* (1960) 364 U.S. 40, 49 and *Palazzolo v. Rhode Island* (2001) 533 U.S. 606, 633:

> The Fifth Amendment forbids the taking of private property for public use without just compensation. We have recognized that this constitutional guarantee is "'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Penn Central, supra*, at 123-124, 98 S.Ct. 2646 (quoting *Armstrong v. United States*, 364 U.S. 40, 49, 80 S.Ct. 1563, 4 L.Ed.2d 1554 (1960)).

The most egregious aspect of this whole proceeding, however, is the fact that Appellant Property Owners have never been applicants for any project that would have justified taking strips out of the middle of their property "for its benefit." The decisions to shift the right-of-way rested solely with Real Party and Respondent City, which rightfully should bear the expense.

III. THE COURT OF APPEAL ERRED IN AFFIRMING THE USE OF APPRAISAL REPORTS TO DEMONSTRATE MARKET VALUE INCREASE AS A BASIS FOR A FINDING OF "BENEFIT."

At page 17, the Opinion holds that Respondent City made the required individualized determination regarding

the degree of connection between the exaction imposed (e.g., the cost reimbursement lien) and the projected impact (e.g., benefit to Appellant Property Owners property) of the district improvements, citing *Ehrlich v. City of Culver City, supra*, 12 Cal.4th 854, 879-880; and *Dolan v. City of Tigard, supra*, 512 U.S. 374, at 391, 395-96.

As an initial matter **the substitution of the word "benefit" for "effects of the development"** on the basis of the fact that Appellant Property Owners were not seeking approval of a project is entirely unsupported by any statutory or case law, and the Opinion cites none. Patently, there is and could be no honest justification for such sleight of hand when Appellants' property was seized by eminent domain, but through this ruse perpetrated by the City, Appellants were denied just compensation.

No reported case refers to, much less mandates, the the unilateral use of appraisal opinions as a basis for exactions.

A review of the record shows that the sole basis for the finding of benefit to Appellant Property Owners was the opinion of Randy Tagg, an appraiser, that the property had been enhanced in value by $2,000,000.00 by the totality of the improvements including both the prior two assessments and the second increase, without segregating one from another. [App.-3, 503]

The Opinion provides no legal authority to support the proposition that an appraisal opinion indicating an enhancement of market value of the Appellant Property Owners property alone is a sufficient basis for a finding of rough proportionality.

The Opinion beginning at page 17 entirely accepts, without question the Tagg appraisal, and entirely omits to consider that such appraisal was not grounded in the reality of an actual development proposal, as opposed to speculation as to what the City might or might not approve. Perhaps more importantly, in a normal taking case where appraisal testimony is taken, it is tested through cross-examination and the defense opinion testimony. In this case the record makes clear that there was no discussion of the sense or underpinnings of Tagg's appraisal testimony at all, since the proceedings were nothing more than a "rubber stamp" exercise.

IV. THE COURT OF APPEAL ERRED IN DECLINING TO CONSIDER THE TRAFFIC EFFECTS INVOLVED IN REAL PARTIES DEVELOPMENT AS THE PROPER LOGICAL BASIS FOR ROUGH PROPORTIONALITY ANALYSIS.

The Opinion states, at 18, that "City was not required to apply the rough proportionality test based on evidence regarding current and/or projected vehicle traffic on Westview Parkway and Galvin Avenue" noting that Appellant Property Owners did not cite any case law supporting the idea that rough proportionality of exaction should be based on relative use of the improvements for which the exaction is made.

However, neither the Opinion nor the briefing by City or Real Party provided any previous decisional authority that contradicts this view, and, in fact, the Opinion demonstrates misapplication of City policy 200-1 at footnote 8,

which distinguishes between types of uses of road improvements.

The Opinion appears to assume that the strip of Westview Parkway and Galvin Avenue that trisected Appellants' property was "the portion of the street system which provides for local traffic movement and access to abutting property" as opposed to

- Streets which facilitate the movement of through traffic, or serve in a collector function and are of benefit to the general area as to which, pursuant to Council policy number 200-1, "this community should share in the costs" or
- Features which expedite the movement of large volumes of traffic or which provide major service for other areas are of general benefit to the City which, pursuant to Council policy number 200-1, "merit funding from tax sources."

Absent consideration of a traffic study, it would not be possible for Respondent City to figure out how a road improvement should be financed. When here [sic] is doubt about the specific proportion of use between the public and the property owner, it should be in favor of public funding, not assessments of individual property owners in amounts unrelated to their use of the resulting streets.

When one compares the 696 Average Daily Trips[5] that would be attributable to the 87 maximum residential units on Appellant Property Owners' property, [App.-3, 456] with

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[5] Average Daily Trips per Dwelling Unit times the number of expected dwelling units (or other users) is the fundamental yardstick for design of circulation systems in City.

the 25,000 Average Daily Trip cap, and the 8,000 existing Average Daily Trips as of April, 1998, [App.-3, 456] the idea that 696 trips, which are, per the record, 8.7% of current, and 2.8% of projected trips should account for 100% of the right-of-way cost is absurd.

One would think logically that a comparison of street usage between the subject properties, the properties in the district, and the general public would be necessary for any determination of proportionality. The Opinion nowhere describes how City satisfies the mandate of Ehrlich: " . . . proof by the [City] . . . of a 'rough proportionality' between the magnitude of the fiscal exaction and **the *effects* of the proposed development**." (*Ehrlich v. City of Culver City*, *supra*, 12 Cal.4th 854, at 859, emphasis added.)

The Opinion itself even cites a passage from *White v. County of San Diego*, *supra*, 26 Cal.3d 897, 904 "Property may be specially assessed only for improvements that provide it benefits beyond those received by the general public." Absent consideration of traffic patterns, no legitimate determination of the benefit of a road improvement can be made, hence the Court of Appeal was entirely in error.

V. THE COURT OF APPEAL ERRED IN USING BENEFIT" AS A BASIS FOR PROPORTIONALITY DETERMINATION AS OPPOSED TO "THE EFFECTS OF THE PROPOSED DEVELOPMENT" AS MANDATED BY *EHRLICH*, RESULTING IN INJUSTICE.

The Court of Appeal's slippage into "benefit" terminology at page 10 of its earlier March 6, 2000 Opinion and in

the entirety of its October 29, 2002 Opinion is simply not faithful to the mandates of *Dolan*, *supra*, or even *Ehrlich*, *supra*. The Court of Appeal accurately **quoted** the *Ehrlich* mandate at the bottom of page 9 and the top of page 10 of the March 6, 2000 Opinion [App.-3, 11-12] as " . . . agency must prove . . . a 'rough proportionality' between the magnitude of the fiscal exaction and the **effects** of the proposed development," (emphasis added) and then without explanation segued to the outdated "benefit" language of the abrogated *White* case, which apparently has now become the foundation for the decision in the current Opinion.

While it does not appear that *White* has yet been expressly disapproved, its bald conflict with the more recent trio of cases is patent, this is the time for its demise. In *Ehrlich*, this Court embraced the Supremacy Clause (Article VI of the United States Constitution) as never before in land use matters, and the supremacy of *Dolan/Nollan* is beyond doubt.

The Opinion notes that *Ehrlich* held " . . . when [government] imposes special, discretionary permit conditions on development by individual property owners . . . *Nollan* and *Dolan* require that such conditions, whether they consist of possessory dedications or monetary exactions, be scrutinized under the heightened standard." (*Ehrlich v. City of Culver City*, *supra*, 12 Cal.4th 854, at 881.)

Despite the recitation of the heightened scrutiny standard, the Court of Appeal erroneously declined to actually apply it.

CONCLUSION

For the reasons stated above, Appellant Property Owners respectfully request this Court to vacate the Slip Opinion of the Court of Appeal, and review this matter, and reverse the Judgment of the trial court below and take such other action as is necessary to achieve uniformity of decision to prevent Respondent City, and other public agencies, from stealing rights of way consisting of both sides of a road largely intended to serve others and the general community, in violation of its own stated policies, entirely without paying property owners for it.

The Slip Opinion flat-out trashed the "real" *Dolan/Ehrlich* rough proportionality test, and replaced it with an incomplete, inaccurate, homemade so-called test, unsupported by any current legal authority, and plainly in conflict with *Dolan* and *Ehrlich* and their underlying principles and purposes. This Court should discourage such outrageous sleight-of-hand with well-settled legal principles which blatantly and deliberately undermines property owners' Federal and State Constitutional Rights.

The effect of the Opinion as it is currently framed is to confirm Respondent City's current pattern of consistently condemning property as "right-of-way" and then "assess back" the money it pays based on "benefit" in direct violation of the takings clauses of the Federal and California constitutions.

Appellants respectfully request that this Court review this decision, and acknowledge that the law of eminent domain and the Federal and State Constitutional rights of property owners are intact, such that property cannot be taken without just compensation.

Dated: December 5, 2002 Respectfully submitted,

LAW OFFICES OF LOUIS E. GOEBEL

By: /s/ Louis Goebel
Louis E. Goebel, Attorney for Appellants CLEM ABRAMS and JOHN BOHANNON

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No. 02-1545

In The
Supreme Court of the United States

CLEM ABRAMS AND JOHN BOHANNON,

Petitioners,

v.

CITY OF SAN DIEGO, CALIFORNIA, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeal For The State Of California Fourth Appellate District

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent City of San Diego respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the unpublished opinion of the California Court of Appeal, District Four, Division One. Pursuant to California Rule of Court Rule 977(a), the unpublished opinion of the Court of Appeal cannot be cited or relied upon by a court or a party in any other action or proceeding.

I.

INTRODUCTION

This is the conclusion of the third appeal in Petitioners' longstanding attack upon the San Diego City Council's decision to form a cost reimbursement district in 1990.[1] The District was established to compensate Mesa Shopping Center East [MSCE] for some of the costs it incurred in building several public improvements in the eastern Mira Mesa area of the City of San Diego [City]. These improvements provide special benefits to numerous undeveloped properties in the District, including Petitioners' property. Petitioners' challenge the City Council's decision on June 23, 1992 to increase the assessment levied against their property by approximately $545,000.

The four questions presented by Petitioners, although argumentative and hardly a model of clarity, revolve around the same legal theory. Petitioners contend that the

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[1] The cost reimbursement district is hereafter referred to as "the District."

City Council, the trial court, and the Court of Appeal erred by focusing upon the relationship between the final increase to the assessment and the special benefits received by Petitioners' property created by the District improvements. There can be no reasonable dispute that the public improvements financed through the District provide Petitioners with unique benefits not shared by the public generally. Because MSCE built the District improvements, Petitioners' agriculturally zoned land is capable of being developed at urban densities. The undisputed evidence in the record established that Petitioners' land increased in value over $2 million in 1992 because MSCE built the improvements at issue in this case. Under Petitioners' approach, the special benefits their land derives from the District improvements are wholly irrelevant to the validity of the assessment. However, well-settled case law, including several past opinions of this Court, hold otherwise. Assessments for the cost of public improvements have always been subject to a test of special benefit, and the Court of Appeal properly applied that test to facts presented here.

Moreover, while not required, the Court of Appeal in fact applied heightened scrutiny under *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), and affirmed the assessment in question. The Petition represents a thinly veiled attack upon the state court's factual findings underlying its conclusion that *Dolan's* "rough proportionality" test had been satisfied. The Supreme Court should not exert its jurisdiction to review a decision of a state court upon a question of fact.

Finally, as an independent ground for its decision, the Court of Appeal found that Petitioners waived any

challenge to the assessment. Petitioners fail to present any federal question in their attack upon this finding. This Court lacks jurisdiction to review the state court's independent and adequate state ground for its decision.

II.

BACKGROUND

Petitioners present an argumentative, incomplete, and, at times, incorrect statement of facts. A more thorough presentation of the facts is necessary to understand the basis for the June 23, 1992 increase to Petitioners' assessment.

A. Cost Reimbursement Districts

Under the California Subdivision Map Act, a city may require developers to install public improvements outside of their subdivision for the benefit of surrounding properties. Cal. Gov't Code § 66485. However, if a city imposes such a requirement, it must enter into an agreement to reimburse the developer for the cost of the supplemental improvements. Cal. Gov't Code § 66486. A city may pursue one of three methods to reimburse the developer: (1) the city can impose a reasonable charge on those who use the supplemental improvements; (2) the city may pay the costs of the supplemental improvements and then reimburse itself by levying a charge upon the real property benefitted; or (3) the city may establish and maintain a local benefit district for the levy and collection of charges from the benefitted properties. Cal. Gov't Code § 66487.

San Diego has chosen the third option in its implementing ordinance, San Diego Municipal Code section

62.0208. (Appellant's Appendix [A.A.] volume 3, p. 645).[2] Under the Municipal Code, the City may form a cost reimbursement district and include those properties that are specially benefitted from the construction of another developer's supplemental improvements. (*Id.* at p. 651, San Diego [S.D.] Municipal Code § 62.0208, subdivision (j)). Each property within a cost reimbursement district is assessed a share of the costs of the supplemental improvements based upon their respective benefit. (*Ibid.*) Benefit may be obtained by frontage or proximity to the supplemental improvements, release of anticipated infrastructure responsibilities, or by other means as determined by the City's Street Superintendent. (A.A v. 3, p. 651, S.D. Municipal Code § 62.0208(j)). The cost reimbursement assessment is imposed as a lien against the property receiving the benefit. The lien is initially approved based upon cost estimates of the supplemental improvements. (A.A. v. 3, p. 652). After the improvements have been constructed and the final costs have been audited, liens may be modified to reflect the actual costs of the supplemental improvements. (*Ibid.*) Assessments are paid only when a final map is recorded or a building permit is issued with a construction value in excess of $20,000. (*Id.* at S.D. Municipal Code § 62.0208(k)). If an assessment is collected, the proceeds are given to the developer who built the supplemental improvements, less an administrative fee collected by the City. (*Id.* at S.D. Municipal Code § 62.0208(l)).

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[2] Unless otherwise noted, all record references are to the three volume Appellant's Appendix before the Court of Appeal.

B. Petitioners' Share of the Cost Reimbursement District Improvements

The District at issue in this case was formed by the City Council in February 1990 to reimburse MSCE for the costs of building a series of public improvements of benefit to surrounding undeveloped properties. (A.A. v. 2, p. 374). MSCE was the first property owner on Mira Mesa Blvd. between Black Mountain Rd. and Interstate 15 to develop, and was required to install a series of supplemental public improvements for the benefit of neighboring undeveloped parcels. (A.A. v. 2, p. 466). These supplemental improvements included the widening of Mira Mesa Boulevard, the construction of a Cal Trans Park and Ride lot, and the relocation of overhead facilities. In addition, MSCE was required to construct portions of a new street [Westview Parkway] from Mira Mesa Blvd., past MSCE's northern boundary to Galvin Avenue. (*Ibid.*) MSCE was also obligated to construct the portions of Galvin Avenue fronting its property as well as a small section abutting Petitioners' parcel. (A.A. v. 2, p. 501). Finally, MSCE installed a new traffic signal on Mira Mesa Blvd. at the intersection of Westview Parkway. (A.A. v. 2, p. 468).

In September 1990, Petitioners' property was assessed $998,299 as its fair share of the estimated cost of the supplemental improvements built by MSCE. (A.A. v. 2, p. 375). Almost all of the $998,299 assessment represented the costs to: (1) acquire rights-of-way and construct the small portions of Westview Parkway and Galvin Avenue that provide ingress and egress to Petitioners' property; and (2) extend storm drains, water and sewer mains to exclusively serve Petitioners' property. (A.A. v. 2, p. 467). In addition, the $998,299 assessment included $24,633 of

the costs of building a Cal Trans Park and Ride lot adjacent to Petitioners' property.

Because the $998,299 assessment was approved while the improvements were under construction, the September 1990 assessment was based upon cost estimates to build these public improvements. *(See* A.A. v. 2, p. 466, noting that actual costs were not known until the improvements were built in 1992).

After a noticed public hearing on June 23, 1992, the City Council voted to increase Petitioners' assessment by approximately $545,000, for a total of $1.54 million. (A.A. v. 2, p. 468). The increase to Petitioners' assessment was approved after the improvements were built when the true costs of the supplemental improvements were known and audited. (A.A. v. 2, p. 466). The June 23, 1992, action merely spread cost overruns amongst the properties within the District. However, the formula for spreading the improvement costs was established when the District was originally formed in 1990. (*Id.* at pp. 468-470). Petitioners were assessed for the costs to build the portions of Westview Parkway and Galvin Avenue that fronted approximately 1.5 acres of their 9.31 acre parcel, including right-of-way acquisition costs and the costs to extend municipal utilities to their property. (*Id.* at pp. 468-469). MSCE dedicated the land needed to build the District improvements. (*Id.* at 469). Consequently, the right-of-way costs paid to Petitioners were the only reimbursable right-of-way costs included in the District.

C. Petitioners File Suit in August 1992 Challenging the Entire $1.54 Million Assessment and The City is Ordered to Demonstrate a Factually Sustainable Proportionality Between the Final Increase of $545,000 and the Benefit to Petitioners' Property.

Petitioners' original Petition/Complaint was filed in August 1992. (A.A. v. 1, p. 7). The trial court sustained the City's demurrer without leave to amend on statute of limitations grounds, however, that decision was reversed by the Fourth District Court of Appeal, Division One in case number D019566.

After the case was remanded, the trial court eventually granted a petition for writ of mandate on June 30, 1997. (A.A. v. 1, p. 1). Among other things, the trial court found that Petitioners were barred by the ninety-day statute of limitations in California Code of Civil Procedure 1094.6(e) from challenging almost $1 million of the $1.54 million assessment. (A.A. v. 1, p. 2). However, the lower court also found that the City had not demonstrated a factually sustainable proportionality between the increase to Petitioners' assessment approved on June 23, 1992, and the benefit to the property. (A.A. v. 1, p. 2). Petitioners never appealed the trial court's determination of the statute of limitations issue.

MSCE pursued an appeal of the trial court's judgment granting the petition for writ of mandate. The trial court's judgment was eventually affirmed by the Court of Appeal on March 6, 2000, in case number D029343. (A.A. v. 1, pp. 3-15). The appellate court concluded that the administrative record did not contain substantial evidence supporting a finding of rough proportionality between the final increase to the assessment and the benefits to Petitioners' property. (A.A. v. 2, p. 383).

D. The City Council Conducts a Public Hearing on June 19, 2000 and, on the Basis of New Expert Reports, Makes a Factual Finding of Rough Proportionality

Rather than participate in the appeal of the trial court's judgment, the City retained three independent consultants to reevaluate the increase to Petitioners' assessment. On June 19, 2000, the City Council voted unanimously to accept the amended cost reimbursement report [the Amended Report] by public finance consultant Jerome Fournier. (A.A. v. 2, pp. 597-598). On the same date, the City Council found that, based upon the Amended Report, the June 23, 1992, increase to Petitioners' assessment was roughly proportional to the benefits identified in the Amended Report. (A.A. v. 2, pp. 597-598). The Amended Report includes an appraisal prepared by Randy Tagg, a certified appraiser, and a development cost survey prepared by the Rick Engineering Company. (A.A. v. 2, pp. 464-596).

The Amended Report includes a detailed discussion of the benefits Petitioners' land realized from the supplemental improvements built by MSCE. Among other things, the Amended Report confirms that in 1992, MSCE completed construction of the streets and public utilities needed to serve the development of Petitioners' parcel at urban densities. (A.A. v. 2, pp. 520-529). As a result of MSCE's work, Petitioners have been relieved of future development costs and can immediately seek to rezone the property to develop at least 10-15 dwelling units per acre as proposed in the Mira Mesa Community Plan. (A.A. v. 2, pp. 482-501; pp. 533-535). Prior to the District improvements, Petitioners' land had extremely limited development potential. The land was zoned agricultural and Petitioners

could build by right only one single family residence. After construction of the District improvements, Petitioners' land had dramatically improved ingress and egress and could be rezoned to build a minimum of 87, and perhaps as many as 150 dwelling units. (A.A. v. 2, p. 537). Assuming development of a modest 87-unit project, Petitioners' land increased in value over $2 million in 1992 – in the depths of a recession – because of the improvements built by MSCE. (A.A. v. 2, p. 505).

The Amended Report also included a detailed engineering analysis by the Rick Engineering Company. (A.A. v. 2, p. 484). This analysis concluded, among other things, that Petitioners would have incurred $2.185 million in costs (in 1992 dollars) to install the minimum infrastructure necessary to service development of its property as envisioned in the Community Plan. Since MSCE satisfied these infrastructure costs, Petitioners can now develop without incurring these costs. The assessment is required to be paid only if by April 2010, Petitioners record a final subdivision map or the City issues a building permit with a construction value in excess of $20,000. If Petitioners do not develop their land by April 2010, the lien will be removed and Petitioners will escape any obligation to pay for any of the District improvements.

E. The Trial Court and the Court of Appeal Conclude that the City Council's June 19, 2000, Action is Supported by Substantial Evidence

Shortly after the City Council's June 19, 2000, decision, Petitioners filed a supplemental petition for writ of mandate. (A.A. v. 1, pp. 18-23). The supplemental petition alleged that the City failed to satisfy the trial court's

command to demonstrate a factually sustainable proportionality. (A.A. v. 1, p. 20, lines 19-20). Petitioners also claimed the City Council violated their procedural due process rights. (A.A. v. 1, p. 21). Following oral argument on January 9, 2001, the trial court denied the supplemental petition. (A.A. v. 3, p. 676).

Petitioners pursued yet another appeal, this time raising only a single issue, namely, whether the evidence before the City Council on June 19, 2000, provides substantial evidence to support the City Council's finding that the increase to the assessment is roughly proportional to the benefits received by their property. Petitioners abandoned any claim that the City Council violated their procedural due process rights.

On October 29, 2002, the Court of Appeal affirmed the trial court's judgment, concluding, *inter alia*, that: (1) Petitioners had waived any challenge to the general concept of including right-of-way costs in the District; and (2) the City Council's decision was supported by substantial evidence in the administrative record.

On December 6, 2002, the Court of Appeal denied a Petition for Rehearing filed by Petitioner, and on January 22, 2003, the California Supreme Court denied Petitioners' Petition for Review.

III.

REASONS WHY THE PETITION SHOULD BE DENIED

A. Special Assessments for Public Improvements Have Long Been Governed by a Test of Special Benefit

Assessments against real property for the costs of public improvements have been subject to a test of special benefit for over a century. In *Illinois Central Railroad Co. v. Decatur*, 147 U.S. 190, 199 (1893), this Court defined the core attributes of an assessment as follows: "Special assessments . . . are made upon the assumption that a portion of the community is to be especially and peculiarly benefited, *in the enhancement of the value of property* peculiarly situated as regards a contemplated expenditure of public funds; and, in addition to the general levy, they demand that special contributions in consideration of the special benefit, shall be made by the persons receiving it." (italics added).

The cases in which this Court has applied the special benefit test are legion. For instance, in *Village of Norwood v. Baker*, 172 U.S. 269, 278 (1898), the Court observed,

> [u]ndoubtedly, abutting owners may be subjected to special assessments to meet the expenses of opening public highways in front of their property; such assessments, according to well-established principles, resting upon the ground that special burdens may be imposed for special or peculiar benefits accruing from public improvements. . . . And, according to the weight of judicial authority, the legislature has a large discretion in defining the territory to be deemed specially benefited by a public improvement, and

> which may be subjected to special assessment to the meet the cost of such improvement.

(internal citations omitted).

In *Webster v. City of Fargo*, 181 U.S. 394, 395 (1901), the Court held that it is within the power of the legislature to create special taxing districts and to charge the cost of a local improvement, in whole or in part, upon the property in the district either according to valuation or superficial area of frontage. Similarly, in *French v. Barber Asphalt Paving Co.*, 181 U.S. 324, 343-344 (1901), the Court observed, "[t]he courts are very generally agreed that the authority to require the property specially benefited to bear the expense of local improvements is a branch of the taxing power, or included within it . . . ." (internal quotations omitted); *see also Kansas City Southern Ry. Co. v. Road Improvement Dist. No. 3,* 266 U.S. 379, 386 (1924) ("By a long line of decisions in this court . . . the Legislature of a state may require that the cost of a local public improvement . . . be distributed over the lands particularly benefited, and charged against them according to their value, their area, or the benefits which they will receive . . . ."); *accord Atchinson T. & S.F. Ry. Co. v. Public Utilities Commission*, 346 U.S. 346, 352 (1953) (noting that assessments for the cost of street, sewer and drainage projects must bear some relationship to the benefits received by the property).

Other federal courts have similarly held that special assessments are constitutional if based upon the special benefits received by the assessed property. *See Federal Deposit Insurance Corp. v. City of New Iberia*, 921 F.2d 610, 615 (5th Cir. 1991) (holding that special assessments are founded upon special benefits and that local tax

assessments are constitutional unless they amount to such an abuse to be an outright confiscation of property); *see also McGowan v. Capital Center Inc.*, 19 F. Supp. 2d 642, 646 (S.D. Miss. 1998) (" . . . the underlying rationale for distinguishing 'special assessments' from 'taxes' relates not so much to the particular 'improvement' involved as to the particular benefit of the improvement – whether or not a tangible benefit – to the persons against whom the assessment is made.")

California courts have also applied the special benefit test developed by this Court. For instance, in *Dawson v. Town of Los Altos Hills,* 16 Cal. 3d 676 (1976), property owners challenged the imposition of sewer assessments against their property, claiming the assessments were adopted without statutory authority and were excessive. The Court in *Dawson* defined the legal test governing the adoption of assessments against real property as follows:

> As is manifest from this brief review, the establishment of a special assessment district takes place as a result of a peculiarly legislative process grounded in the taxing power of the sovereign. . . .
>
> The scope of judicial review of such actions is quite narrow. The board of supervisors is the ultimate authority which is empowered to finally determine which lands are benefited and what amount of benefits shall be assessed against the several parcels benefited. . . .
>
> This determination is made after a full hearing accorded to all persons interested to make such objection as they see fit. In such a case the court will not declare the assessment void unless it can plainly see from the face of the record, or from

> facts judicially known, that the assessment so finally confirmed is not proportional to the benefits, or that no benefits could accrue to the property assessed.

Dawson, supra, 16 Cal. 3d 683-684 (internal quotations and citations omitted).

A decade later, the California Supreme Court reiterated the standards applicable to special assessments in *San Marcos Water District v. San Marcos Unified School District,* 42 Cal. 3d 154 (1986). There, the Court held that a sewer capacity fee was properly characterized as an "assessment" which could not lawfully be imposed upon the school district. (*Id.* at 158). In defining the essential characteristics of an assessment, the Court, quoting its earlier opinion in *Spring Street Co. v. City of Los Angeles,*170 Cal. 24, 29 (1915), observed, "it [an assessment] is a compulsory charge placed by the state upon real property within a predetermined district, made under express legislative authority for defraying in whole or in part the expense of a permanent public improvement . . . " *San Marcos Water District, supra,* 42 Cal. 3d at 161. Distinguishing between a tax and an assessment, the Court concluded that an assessment "is a charge placed upon real property for local public improvement, of direct benefit to that property . . . " *Ibid.* quoting *Solvang Municipal Improvement Association v. Board of Supervisors,* 112 Cal. App. 3d 545, 552-553 (1980).

In *Knox v. City of Orland,* 4 Cal. 4th 132 (1992), the Court was called upon to determine whether a special assessment for park maintenance was a tax subject to the limitations of article XIII A of the California Constitution. Noting the difference between a tax and an assessment, the Court observed:

> The rationale of special assessment is that the assessed property has received a special benefit over and above that received by the general public. The general public should not be required to pay for special benefits for the few, and the few specially benefited should not be subsidized by the general public. Thus, [a]lthough a special assessment is imposed through the same mechanism used to finance the cost of local government, in reality it is a compulsory charge to recoup the cost of public improvement made for the special benefit of a particular property.

Knox, *supra*, 4 Cal. 4th at 142 (internal quotes and citations omitted).

The Court in *Knox* held that special assessments will not be set aside by the judiciary "unless it clearly appears on the face of the record before that [legislative] body, or from facts which may be judicially noticed, that the assessment as finally confirmed is not proportional to the benefits to be bestowed to the properties to be assessed or that no benefits will accrue to such properties." *Knox*, *supra*, 4 Cal. 4th at 146, quoting *Dawson*, *supra*, 16 Cal. 3d at 685; *accord Southern California Rapid Transit Dist. v. Bolen*, 1 Cal. 4th 654, 661 (1992) (noting that the essential feature of an assessment is that public improvement financed through it confers a "special benefit" on the property assessed.); *see also Not About Water Committee v. Board of Supervisors*, 95 Cal. 4th 982, 994 (2002) (applying the special benefit test to assessments subject to article XIII D of the California Constitution).

The "special benefit" test applicable to assessments has been consistently applied by the federal and California courts for almost a century. Petitioners fail to cite even a

single case applying a different standard to a challenge to an assessment against real property for public improvements. Thus, review is unnecessary to resolve conflicts within the case law.

B. A Special Assessment is not an Exaction Subject to Heightened Scrutiny Under *Nollan* and *Dolan*

The remaining issues raised by Petitioners are inseparable from their claim that the special benefit test should not apply. For instance, Petitioners contend that the City cannot rely upon appraisal reports to identify the value of the benefits received by their property. (Petition, pp. 21-22). In addition, Petitioners claim that the City was required to quantify the precise amount of traffic that potential development of their land might someday generate, yet Petitioners admit they have never submitted a development application for the land. (Petition, pp. 22-25). Both of these arguments are based upon the erroneous contention that assessments are not subject to the test of special benefit. As detailed above, however, Petitioners misstate the governing test applicable to assessments against real property to recoup the cost of public improvements.

The "nexus/rough proportionality" test developed in *Nollan v. California Coastal Commission,* 483 U.S. 825 (1987) and *Dolan v. City of Tigard,* 512 U.S. 374 (1994) is not directly applicable to special assessments. *Nollan* and *Dolan* involved government imposed property dedication requirements or monetary exactions as mitigation for the adverse impacts caused by development projects. These cases stand for the proposition that exactions imposed by the government as a condition of development will be

upheld where: (1) the condition has a nexus to a legitimate state interest; and (2) the exaction or dedication requirement is "roughly proportional" to the impact of the development. Neither *Nollan* or *Dolan* dealt with the validity of a special assessment.

In *Ehrlich v. City of Culver City,* 12 Cal. 4th 854 (1996), the California Supreme Court held that the *Nollan/Dolan* regulatory takings analysis may apply to nonpossessory exactions in limited circumstances. In *Ehrlich*, the Court held that the *Nollan/Dolan* analysis applies to a narrow class of monetary exactions:

> In our view, the intermediate standard of judicial scrutiny formulated by the high court in *Nollan* and *Dolan* is intended to address just such indicators in land use 'bargains' between property owners and regulatory bodies – those in which the local government conditions permit approval for a given use on the owner's surrender of benefits which *purportedly* offset the impact of the proposed development. It is in this paradigmatic permit context – where the individual property owner-developer seeks to negotiate approval of a planned development – that the combined *Nollan* and *Dolan* test quintessentially applies.

Id. at 868.

Thus, under *Ehrlich,* heightened scrutiny is triggered when development permit conditions are imposed in a discretionary, ad hoc manner on individual projects. On the other hand, legislatively formulated assessments imposed upon a broad class of property owners are not subject to the heightened scrutiny required under *Nollan* and *Dolan. Id.* at 881. As explained more fully in Justice Mosk's concurring opinion in *Ehrlich*:

> Another kind of monetary exaction on property owners which is subject to fairly a deferential standard of judicial review is special assessments. Special assessment districts are established to permit cities and counties to charge groups of property owners for improvements from which they will especially benefit; the individual assessments are to be calculated in proportion to the estimated benefits to the parcels against which they are assessed.

Id. at 894 (Mosk, Justice concurring).

Here, the City Council was acting in a legislative capacity when it approved the cost reimbursement assessment. "[T]he establishment of a special assessment district takes place as a result of a peculiarly *legislative* process grounded in the taxing power of the sovereign . . . " *Dawson, supra*, 16 Cal. 3d at 683 (italics added); *see also Withnell v. Ruecking Const.* Co., 249 U.S. 63, 69 (1919) ("We are of [the] opinion that the assessment made in accordance with the rule of the St. Louis charter was legislative in character . . . ."). The City Council was not engaged in the process of negotiating approval of a planned development for Petitioners when it approved the assessment at issue in this case. Indeed, the City Council could have required all property owners in the District to begin paying their assessments immediately, which would clearly have exempted the assessments from heightened scrutiny under *Nollan* and *Dolan*. Instead, as a convenience to the property owner, the City Council required payment only when land is developed and the property owner is presumably in a more convenient position to pay off the assessment. The timing of the assessment, however, does not change its purpose. The assessment is adopted by legislative act and is broadly applicable to all

land owners in the District. Thus, the appellate court was not required to apply heightened scrutiny under *Nollan* and *Dolan*. *See Ehrlich, supra,* 12 Cal. 4th at 881 (noting that generally applicable development fees or assessments are outside the reach of the *Nollan* and *Dolan* cases).

C. Although Not Required, the Court of Appeal Applied Heightened Scrutiny Under *Nollan* and *Dolan*; the Petition Improperly Seeks Review of a State Court's Factual Findings

Even though it was unnecessary, the Court of Appeal applied the heightened scrutiny under *Nollan* and *Dolan*, and affirmed the trial court's judgment. Petitioners' central complaint is that neither the trial court nor the Court of Appeal required the City to prepare hypothetical traffic studies to measure the number of traffic trips that might someday be generated, if and when Petitioners seek to develop their land. Petitioners' arguments do not merit review by this Court for several reasons.

First, Petitioners ask this Court to exert its jurisdiction to review a decision of a state court upon a question of fact, i.e., whether the assessment satisfied *Dolan's* rough proportionality standard. The Court should not reexamine a state court's findings and conclusions of fact. *Hernandez v. New York*, 500 U.S. 352, 366 (1991) ("Our cases have indicated that, in the absence of exceptional circumstances, we would defer to the state-court factual-findings even when those findings relate to a constitutional issue.") "[A]n issue does not lose its factual character merely because its resolution is dispositive of the ultimate constitutional issue." *Miller v. Fenton*, 474 U.S. 104, 113 (1985).

Second, Petitioners' interpretation of the *Nollan/Dolan* test in the context of special assessments not only finds no support in the case law, the test is simply impractical. Petitioners' proposed test requires highly speculative assumptions. For instance, Petitioners' land remains undeveloped today and the City has no idea when and how Petitioners will seek to develop. The amount of traffic that the property might generate is known only to Petitioners, since they control the scope and timing of development. Petitioners may seek to amend the City's Progress Guide and General Plan to allow for a more intense use. Because Petitioners' property is located in a transit corridor near a heavily traveled freeway and is surrounded with retail commercial uses, it may be wise for Petitioners to seek to develop at a higher density, or for that matter, to seek a Community Plan amendment for a commercial use. Even if Petitioners develop their land consistent with the Community Plan, there is a wide range of average daily trips that could be generated because the Plan allows for a range of densities. The bottom line is that the City does not know how Petitioners will attempt to develop their land, and therefore, cannot determine how much traffic will be created until Petitioners apply to develop their land.

The more accurate way to identify "benefit" in this case is to determine what a willing buyer would pay for the property before and immediately after the improvements were constructed, as the City has done. The approach adopted by the Court of Appeal has long been accepted. *Illinois Central Railroad Co. v. Decatur*, *supra*, 147 U.S. at 199; *see also Cogan v. City of Los Angeles* 34 Cal. App. 3d 515 (1973) ("[b]enefit has been defined as the 'enhancement of the property's market value in relation to

reasonably potential uses as well as present use.'") (internal quotations omitted).

Finally, there is substantial evidence in the record to support the conclusion that Petitioners' assessment is roughly proportional to the "impacts" that would be created by development of Petitioners' land. The administrative record includes a detailed engineering analysis by the Rick Engineering Company. (A.A. v. 2, p. 484). This analysis concludes that Petitioners would have incurred $2.185 million in costs in 1992 to install the minimum infrastructure necessary to service development of their property as envisioned in the Community Plan, including street improvements, sewer, water and storm drains. The private engineering firm concluded that MSCE built all of the improvements Petitioners would otherwise have been forced to construct to develop 87 dwelling units. Had Petitioners been forced to build these improvements, the engineering report indicates that Petitioners would have spent $2.185 million in 1992. Instead, MSCE absorbed the entire cost and Petitioners will only pay the assessment, if they develop before 2010. Thus, the Rick Engineering Report provides additional support for the finding of rough proportionality.

Petitioners' claim that their land has been overassessed is defeated by other portions of the record. At the trial court level, Petitioners claimed they should be assessed somewhere between 2.8 percent and 8.7 percent of the right-of-way costs of Westview Parkway, since development of their property with 87 units will generate 8.7 percent of the current traffic, and 2.8 percent of the projected traffic utilizing Westview Parkway.

However, Petitioners have not been assessed for the portion of Westview Parkway providing for local traffic

movement. Instead, they only bear responsibility for the portion of the street that provides *direct access* to their property. Petitioners bear none of the cost for the segment of the street outside of the boundaries of their property. (*See* A.A. v. 2, p. 501; A.A. v. 3, p. 656).

Westview Parkway measures 6,830.98 feet in length. (A.A. v. 3, p. 656). The portion of Westview Parkway between Mira Mesa Blvd. and Galvin Avenue at issue in this case measures 1,084.95 feet, and was built at a cost of $2,653,954 including both right-of-way and construction costs.[3] The segment of Westview Parkway from Capricorn Way to Black Mountain Rd. (north of Petitioners' property line) is 4,128.05 feet and cost Petitioners' northern neighbor $5 million to build. (A.A. v. 3, p. 656; A.A. v. 1, p. 256). The middle segment of Westview Parkway from Galvin Avenue to Capricorn Way is 1,617.98 feet. (A.A. v. 3, p. 656). This segment was also built by Petitioners' northern neighbor at an estimated cost of $2,958,476.[4]

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[3] This figure is arrived at by adding the construction cost of the road, the right-of-way costs paid to Petitioners, and the value of the right-of-way dedicated by MSCE. (A.A. v. 2, p. 468, table 1 and p. 470, table 2).

[4] Westview Parkway, from Galvin Avenue to Black Mountain Rd. is 5,746.03 feet in length. (A.A. v. 3, p. 656). This includes a 4,128.05 foot stretch of Westview Parkway between Capricorn Way and Black Mountain Rd. that cost $5 million to build. (A.A. v. 3, p. 656; A.A. v. 1, p. 256). A middle segment of Westview Parkway between Galvin Avenue and Capricorn Way is 1,617.98 feet in length. (A.A. v. 3, p. 656). The middle segment was built at an estimated cost of $2,958,476. The cost estimate for the middle segment is calculated by averaging the cost per linear foot for the segment of Westview Parkway between Capricorn Way and Black Mountain Rd. [$1,211 per foot] with the cost per linear foot in the southern segment of Westview Parkway between Mira Mesa Blvd. and Galvin Avenue [$2,446 per foot]. This average is $1,828.50

(Continued on following page)

Therefore, the total cost of Westview Parkway was approximately $10,612,440.

The record shows that Petitioners were assessed for $941,859 of the total cost of $10,612,440. (*See* A.A. v. 2, p. 468, table 1 and p. 470, table 2). This includes both the construction costs for the portions of the street on Petitioners' property and the right-of-way costs paid to Petitioners. This represents 8.8 percent of the total costs for Westview Parkway. Thus, the City satisfied Petitioners' interpretation of the "rough proportionality" test.

D. The Court of Appeal's Decision is Based Upon an Independent and Adequate State Ground

As an independent basis for its decision, the Court of Appeal found that Petitioners were time barred from challenging the June 1992 increase to the assessment. Specifically, the Court of Appeal concluded,

> Because Abrams did not timely challenge the fundamental nature of the improvements, including the acquisition of his rights-of-way, for which the cost reimbursement lien was imposed on his property, we believe he is precluded from arguing that the costs, whether estimated or actual, of acquisition of his rights-of-way was not properly assessed to his property by means of the reimbursement lien.

(Petitioners' Appendix [Pet. App.] pp. 13-14).

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per foot, or $2,958,476 for the middle segment. Thus, the estimated total cost of Westview Parkway north of the Appellant's property is $7.95 million.

The appellate court correctly noted that when the City originally approved the District and the related assessments in 1990, the City had finally determined that Petitioners would bear the cost of those portions of Westview Parkway and Galvin Avenue necessary to provide access to their property. (Pet. App. p. 14). As stated by the Court of Appeal, "[b]ecause Abrams did not timely challenge the 1990 original and increased reimbursement liens imposed by City on his property for district improvements, which included the estimated costs for acquiring his rights-of-way, the amounts of those liens, and presumably the improvements underlying those amounts cannot now be challenged." (Pet. App. p. 14). The Court relied upon the ninety-day statute of limitations in California Code of Civil Procedure section 1094.6(e). That statute provides a ninety-day time period to file a petition for writ of mandamus in state court to challenge the City Council's decision after a noticed, public hearing. (Pet. App. p. 14, fn.6).

Although Petitioners claim the Court of Appeal erred in reaching this result, they fail to cite any authority to support their position. More importantly, Petitioners neglect to identify a federal issue in their attack upon this portion of the Court of Appeal's unpublished decision. As previously stated by this Court, "[the United States Supreme] Court will not take up a question of federal law presented in a case 'if the decision of [the state] court rests on a state law ground that is *independent* of the federal question and *adequate* to support the judgment.'" *Lee v. Kemna*, 534 U.S. 362, 375 (2002), quoting *Coleman v. Thompson*, 501 U.S. 722, 799 (1991). "The rule applies with equal force whether the state-law ground is substantive or procedural." *Lee, supra,* 534 U.S. at 375. Here, the

Court of Appeal's resolution of the statute of limitations issue provides an independent and adequate state ground for its decision.

Furthermore, the Court of Appeal correctly decided the statute of limitations question. Contrary to Petitioners' claims, the unpublished decision does not give the City "carte blanche" authority to make whatever changes it desires to the assessment, after it is initially approved. The Court of Appeal merely recognized that when the assessment was initially approved in February 1990 and later amended in September 1990, the City indicated that specified street right-of-way costs would be borne by Petitioners. The final increase to the assessment in 1992 was attributable to increased right-of-way costs that the City had already clearly determined in 1990 would be borne by Petitioners. Petitioners never timely challenged the City Council's adoption of the assessments in February and September 1990. Accordingly, Petitioners cannot challenge the notion of including the right-of-way acquisition costs in the assessment, since they failed to timely file a petition for writ of mandamus within ninety days as required by California Code of Civil Procedure section 1094.6(e).

Petitioners seek to avoid this obvious result by claiming the City approved a new alignment for Westview Parkway, after September 1990. Petitioners contend, without any evidentiary support, that the new alignment was designed to shift more of the street onto their property, and thereby shift the costs of the street to them.

While this argument does not appear to have been raised at the administrative level, and therefore, has not been preserved for appellate review, Petitioners are simply

wrong on the merits. The alignment of Westview Parkway and Galvin Avenue was confirmed when the City Council approved MSCE's tentative map in 1989. The alignment of Westview Parkway, as approved by the City Council, appears at page 39 of the administrative record in case number D029343. The drawing is dated January 29, 1990, *before* the initial cost reimbursement district was formed in February 1990. There were no changes to the alignment of the streets in question.

IV.

CONCLUSION

For the foregoing reasons, Respondent City of San Diego, requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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In The
Supreme Court of the United States

CLEM ABRAMS and JOHN BOHANNON,

Petitioners,

v.

CITY OF SAN DIEGO,

Respondent.

On Petition For A Writ Of Certiorari
To The Court Of Appeal
For The State Of California
Fourth Appellate District

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INTRODUCTION

Though decidedly detailed and erudite, Respondent City's Brief in Opposition entirely fails to negate the fact that what happened in this case with the purported third lien increment of the purported cost reimbursement district was that, in a pre-calculated plan, Respondent City took back the just compensation it only recently "paid" Petitioners for the right of way it took from the middle of Petitioners' parcel, in violation of Petitioners' Fifth Amendment rights.

Respondent City's Brief entirely ignores the fact that Petitioners, unlike the Petitioners in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Ehrlich v. City of Culver City*, 12 Cal.4th 854 (1996), were merely holding property, and were specifically not applying for any sort of permission to develop it which would give rise to the normal procedure of Respondent City, which is to exact such rights of way as a condition of development.

Because exaction was not available as a vehicle to take the right of way without compensation, Respondent City improperly and in violation of its own policies with respect to rights of way which require consideration of local and regional use by the public in addition to the adjacent property owners, used the third lien increment to accomplish the same goal, to wit: to take Petitioners' land without paying for it.

That is the crux of this case:

May a public agency exercise eminent domain powers to take real property interests without compensation on

the basis of "benefit" or take real property with compensation, but then "assess" back the acquisition cost to the property owner through a cost reimbursement district as a "benefit," based on a case such as *White v. County of San Diego*, 26 Cal.3d 897 (1980), thereby ultimately acquiring the real property without compensation to the property owner?

I. THE COST REIMBURSEMENT DISTRICT IN THIS CASE DID NOT "SANITIZE" THE TAKING OF PETITIONERS' PROPERTY WITHOUT JUST COMPENSATION.

Respondent City argues at several points in its brief that Special Assessment Districts such as the Cost Reimbursement District in this case are permissible and are legislative action, such that somehow they "sanitize" exactions and takings from the level of scrutiny under the Fifth Amendment to which eminent domain or exactions as to specific development project proposals are subjected.

As an initial matter, it is technically accurate to state that the taking in this case was not an "exaction" in the *Nollan*, *Dolan*, *Ehrlich* sense because Petitioners were not applying for development of their property for which mitigation efforts of any sort would be appropriate. The third lien increment was a taking nonetheless, all the more egregious because Petitioners were innocent bystanders, apparently in the way of development progress.

An analogy to this case would have been if, in *Nollan*, rather than telling Mr. Nollan that he could not build his home unless he dedicated five feet for public coastal access, the relevant public agency had, in the absence of any development proposal, condemned the five foot access,

"paid" Mr. Nollan for it, and then assessed Mr. Nollan for the cost of the access. The net effect is the same, to wit: a taking without compensation.

II. THE THIRD LIEN INCREMENT OF THE COST REIMBURSEMENT DISTRICT IN THIS CASE RESULTED IN AN OUTRIGHT CONFISCATION OF PETITIONERS' PROPERTY.

At pages 11 and 12 of its Brief in Opposition, Respondent City cites authority for the general proposition that abutting owners may be constitutionally subjected to special assessments to meet the expenses of opening public highways in front of their properties.

At 12, Respondent City cites *Federal Deposit Insurance Corp. v. City of New Iberia*, 921 F.2d 610, 615 (5th Cir. 1991) for its "holding that special assessments are founded upon special benefits and that local tax assessments are constitutional **unless they amount to such an abuse as to be an outright confiscation of property**." (Emphasis added.)

Here, that is exactly what the third lien increment amounted to. Respondent City "paid" Petitioners for the significant portion taken from the middle of their property as right of way through eminent domain, on the one hand, while assessing Petitioners for the same cost on the other. The mere fact that this taking was buried in the middle of an otherwise facially appropriate "special assessment" involving "special benefits" to Petitioners' property, asked for or not, should not be held to insulate it from constitutional scrutiny.

Here, Respondent City assessed approximately $1,000,000.00 on Petitioners in the absence of any development proposal whatsoever, and then sought to add over $500,000.00 more, based primarily on the fact that Petitioners sought to be compensated for the significant portion of their property that was being taken exclusively for road right of way which was not, as Respondent City implies, for Petitioners' benefit, but rather in large part was for the benefit of the general public, locally and regionally. That is why Petitioners suggest that traffic analysis is appropriate when evaluating rough proportionality.

Respondent City does not even discuss its Council Policy number 200-1, mentioned in the Petition at page 23, which describes the policy to be considered in allocating the expense of street construction:

1. Streets which facilitate the movement of through traffic, or serve in a collector function and are of benefit to the general area as to which, pursuant to Council policy number 200-1, "this community should share in the costs" or

2. Features which expedite the movement of large volumes of traffic or which provide major service for other areas are of general benefit to the City which, pursuant to Council policy number 200-1, "merit funding from tax sources."

In this instance, Respondent City aggregates the expenditures on Westview Parkway and Galvin Avenue so as to obscure the fact that the third lien increment was confined to Petitioners' property and was almost exclusively composed of recoupment of the compensation paid for the right of way through the eminent domain case.

It was this recoupment that made the condemnation into a taking in violation of Petitioners' Fifth Amendment rights.

III. RESPONDENT CITY SHOULD NOT BE HEARD TO BLOW HOT AND COLD ON THE NOTION OF "SPECULATION."

Respondent City asserts, at 18, that Petitioners' suggestion that use of traffic study information for the evaluation of relative benefit to Petitioners' property as compared to neighboring properties and the local and regional general public somehow involves "speculation."

It seems incongruous for Respondent City to assert on the one hand that such traffic analysis, based on the highest and best currently possible use for Petitioners' property would be "speculative" and then to assert, at page 21, that use of the Rick Engineering projected costs of development of Petitioners' property and use of Randy Tague's appraisal information constituted substantial evidence in support of rough proportionality.

As an additional matter, this Court, when it sees the record, will see everything Respondent City's City Council and the state Courts saw, as there were virtually no live proceedings and such proceedings as did occur, did not involve evidence. Because of that, deference to the state Courts on issues of fact is not necessary.

IV. RESPONDENT CITY'S ARGUMENTS REGARDING ACCESS TO PETITIONERS' PROPERTY ARE INACCURATE.

Respondent City asserts, at page 23, that Petitioners "only bear responsibility for the portion of the street that provides *direct access* to their property." (Emphasis City's.) What Respondent City is actually stating is its unwritten policy that a property owner is to pay the full cost of any street right of way and/or improvement that abuts or crosses his or her property. In other words, access **past** or **through** the property, not just access **to** the property.

Respondent City then feigns surprise, at page 25, at the suggestion that the alignment of Westview Parkway and Galvin Avenue was designed to shift the street onto Petitioners' property. Respondent City does admit, however, that it had determined that Petitioners would bear the cost of the portions of Westview Parkway and Galvin Avenue on their property.

Put another way, in developing areas, Respondent City takes the position that anyone abutting a right of way should dedicate land sufficient to permit the building of a street. If the right of way happens to trisect your property, you are viewed as being responsible for the entire cost of the right of way taken from your property, including the costs of condemning it. This view seemingly eviscerates the law of eminent domain, and would seem to be in direct conflict with one's Fifth Amendment rights, yet it is ingrained in the culture in Respondent City to the point where Respondent City appears unable to recognize that its net effect is to effectuate a taking of real property without compensation.

Having now been caught with its hand in the proverbial cookie jar, Respondent City now seeks to put a "spin" on this, at page 24, to the effect that it is seeking reimbursement for the cost of "those portions of Westview Parkway and Galvin Avenue necessary to provide access to their property." What this means in Respondent City's vernacular is that it sought reimbursement for the **entire cost of the right of way as it trisected Petitioners' property**, not just a proportional cost of access **to** Petitioners' property.

V. THE FACT THAT THE COURT OF APPEAL OPINION IS UNPUBLISHED DOES NOT MITIGATE THE FEDERAL QUESTION.

In this day and age, whether we like it or not, unpublished cases can be as important as published cases. This case is an example. Absent intervention by this Court, Respondent City, and similarly situated public agencies will have apparent *carte blanche* to condemn rights of way for public purposes, and then assess back the full cost of acquisition to the condemnee based on the assumption of "roughly proportional benefit," which was never asked for by the property owner. One of the rights included in the property owner's "bundle of sticks" is the right to be left alone – to not have its property committed, and physically taken, by government, without full compliance, before taking, with the Fifth Amendment requirements, and with the *Nollan-Dolan* requirements. The concept of "benefit," particularly an unrequested "benefit" does not appear in either.

If this is the proper approach, there should be a Federal case confirming it, so that persons such as Petitioners will know the extent of their rights as property

owners in the path of development. If, as Petitioners suspect, this approach does not pass constitutional muster, a published case would be societally beneficial, to force public agencies to more appropriately spread the cost of public improvements among the public rather than, as here, putting it on the backs of a few property owners who just happen to be in the path of land development.

The Court's attention is again invited to *Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (2001):

> The Fifth Amendment forbids the taking of private property for public use without just compensation. We have recognized that this constitutional guarantee is "'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Penn Central, supra,* at 123-124, 98 S.Ct. 2646 (quoting *Armstrong v. United States,* 364 U.S. 40, 49, 80 S.Ct. 1563, 4 L.Ed.2d 1554 (1960)).

CONCLUSION

The Court should grant the petition for a writ of certiorari in this matter.

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